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RECORD, CASE No. 13,493.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~328~~. 32

THE HAMILTON GAS-LIGHT AND COKE COMPANY, APPELLANT,

vs.

THE CITY OF HAMILTON, OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED FEBRUARY 18, 1889.

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1 At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of ——, being also the — day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth—present, the Hon. —— ——, among the proceedings had were the following, to wit:

THE HAMILTON GAS-LIGHT AND COKE COMPANY, Complainant,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, Defendant. } # 4211.

In chancery.

Be it remembered that heretofore, to wit, on the 7th day of January, A. D. 1889, came the complainant, by its solicitors, and filed in the clerk's office of said court their certain bill in equity against said defendants herein. Said bill is in the words and figures following, to wit:

Bill in Equity.

2 In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE CO., a Corporation, Complainant,
vs.
THE CITY OF HAMILTON, Butler County, State of Ohio, Defendant.

Bill in equity.

To the honorable the judges of the circuit court of the United States:

Your orator, The Hamilton Gas-Light and Coke Company, above named, complains and says that it is duly incorporated under the laws of Ohio and has its place of business in the city of Hamilton, Butler county, Ohio, and that the defendant above named is a municipal corporation organized under the laws of Ohio and has by the last Federal census a population of 12,122 and a corporate area of about three and one-half square miles; that the amount in dispute in this matter exceeds, exclusive of cost, the sum or value of two thousand dollars ($2,000), and arises under the Constitution of the United States.

Your orator further says that it was organized in said city of

Hamilton in the year 1855, and was duly incorporated under the laws of the State of Ohio for the purpose of manufacturing and supplying gas to light the streets, alleys, public grounds, and
3 buildings of said city, and to supply gas for the general use of said city and its inhabitants, and on the 9th day of July, 1855, said city, by its council, duly passed an ordinance whereby it granted to your orator the use and authorized it to occupy its streets, lanes, alleys, and public grounds for the purpose of laying therein its pipes and gas mains, for the purposes aforesaid, in accordance with the laws of the State of Ohio in such case made and provided, and on the 9th day of August, 1855, said city council, by an ordinance duly passed, declared said gas works to be highly beneficial to its citizens, and to aid in the successful organization of your orator and encourage others to take its stock said defendant became a stockholder therein and paid into the treasury thereof five thousand dollars ($5,000), being the par value on 100 shares of its said stock, and in said ordinance reserved the right to appoint at all times one of its own members to vote said stock at all meetings of stockholders of your orator.

Said ordinances went into full operation and effect and said defendant assumed all the duties and liabilities and exercised all the privileges of a stockholder and received all the benefits and advantages derived therefrom so long as it owned said stock.

Your orator further says that it accepted the terms and conditions of said ordinances and at once entered upon the discharge of the duties imposed upon it by the laws of the State of Ohio, its charter, and said ordinances, and ever since said date it has fully executed all said duties as required by the laws of Ohio governing
4 gas companies, in such case made and provided, and that it has never violated any of the provisions of its said charter or the requirements of said laws, and that its rights acquired under said charter have never been impaired or lost by any judicial authority whatever, and that the same still remain to your orator in full force and effect.

Your orator further says that, relying upon the laws of the State and the authority vested by them in municipal corporations and relying upon said ordinances, it has gone to great expense of time and money and has expended large sums of money in erecting buildings and in furnishing them with the necessary machinery and appliances for the manufacture of gas and in purchasing and laying down in said streets, public buildings and grounds, and all other public places within said city, by order of said council, all the necessary mains and pipes for the delivery and distribution of its gas for the purposes of public and private lighting, as aforesaid. It says it is now and has been at all times ready, able, and willing to discharge all the duties imposed upon it by its charter and the laws of this State and the orders and resolutions of said council.

Your orator further says that for more than thirty years last past defendant has accepted the services of your orator in furnishing said gas for the purposes aforesaid by authority of said laws, and has repeatedly from time to time exercised all the power conferred

by said laws upon municipal corporations; has repeatedly
5 during said time fixed the price which your orator should charge for its gas so furnished to light said streets, alleys, public grounds and buildings, and the price it should charge for gas furnished to its inhabitants; which orders, ordinances, and resolutions your orator has always obeyed.

That defendant appointed a gas inspector, as provided by law, and has repeatedly from time to time during the last thirty years compelled your orator by authority of said laws to lay its mains in the different streets of said city, and there are at present buried in said streets by orders of said council about thirty miles of gas mains and pipes for the distribution of gas to light said streets and public grounds and buildings and to make the necessary connections therewith; and said mains now form a net-work of iron pipes extending all over said city from its center to its extreme corporate limits in every direction and cover its three and one-half square miles of territory; that said council has compelled your orator to lay its mains along streets of said city on many parts of which for long distances there is no habitation, residence, or buildings of any kind whatever, and along many of which for long distances there is no private consumption of gas whatever, said mines being laid exclusively for the purpose of conveying gas for public lighting alone, of all which facts said council had knowledge at the time it so ordered said mains laid.

Your orator says that, by orders and directions of said council, it has erected upon said mains and connected therewith five
6 hundred and thirty-two public lamp posts with lamps, burners, and all other appliances complete, and that said lamp posts are now connected with its said mains and all are in connection with its works for the manufacture of gas, and it is fully able to supply all the needs of said city and its inhabitants with all the gas they require for all kinds of lighting and for all purposes for which gas is used in said city, and that it has never neglected or refused to furnish the same when required by either said city or its inhabitants, or to lay said mains when duly notified by authority of said council, of which ability and willingness it has notified said council since January 1st, 1889.

Your orator says that on the 27th day of Nov., 1883, defendant's council duly passed an ordinance whereby it fixed the price which your orator should charge and receive for its gas furnished to light said city and furnish to its inhabitants for the period of five years from and after the first day of January, 1884, which ordinance imposed the laying of certain mains by your orator in streets of said city as a condition precedent to the going into effect of said ordinance, which mains were required exclusively for the delivery and distribution of gas for street lamps, there being no dwellings along a great portion thereof, to the terms and conditions of which ordinance your orator assented by its written acceptance thereof filed in the office of the clerk of defendant as required by law, and which ordinance remained in full force until January 1, 1889, and that

during the time said ordinance was in force your orator,
7 under the order and direction of said city council, laid about eight miles of street mains as aforesaid.

Your orator further says that all said gas works, machinery, appliances, and fixtures and all said gas mains, pipes, and connections therewith buried in the ground and connected as aforesaid with said street lamps are the property of your orator, and that all said lamp posts, lamps, and burners thereon are the property of defendant.

It further says that its said property is of great value if used for the purposes for which it was constructed; that it cannot be used or applied to any other purpose where it is and cannot be removed for use to any other locati-n, and is of no value and will be wholly lost to your orator and entirely destroyed unless its present use is continued.

Your orator further says that defendant, by its council, on January 2, 1889, notified it that said city would no longer use any of your orator's gas to light its streets or public buildings nor use any of said gas for any purpose, and would not pay for any gas furnished by your orator for any such purpose after January 1, 1889, and would not allow or permit your orator to use any of the said street lamps or gas posts in connection with your orator's mains for the purpose of being used to light said streets, public grounds, or places within said city, and ordered your orator to remove without delay all attachments and connections between said mains of your orator and said lamp posts of defendant, and ordered and directed
8 its *its* servants and employés to light its public buildings by some other means than by your orator's gas.

And said defendant proposes and intends to light its streets, public grounds, and all its public places within said city by some other means than by your orator's gas, and to enable it to more fully carry out said intention and to destroy your orator's property and investments so acquired and made under the laws of said State of Ohio and the ordinances of said city of Hamilton it has already passed an ordinance to issue one hundred and fifty thousand dollars of its bonds to erect gas works of its own to manufacture gas to be used to light all its streets, public grounds and buildings, and all public places within said city and lay gas mains in said streets, including the streets in which your orator's gas mains are already laid, under the orders and directions of defendant's council as aforesaid, and thereby forever deprive your orator of all right to manufacture and supply gas for said public lighting, and it now threatens to remove and, unless restrained by the order of this court, will remove and disconnect all said lamp posts and other fixtures from their attachments with your orator's said mains, and, unless restrained by the orders of this court, will temporarily light said streets, public buildings, and places with some other means than your orator's gas until it builds its said works and lays its said mains, and then forever deprive your orator of all rights acquired by its charter and for-
9 ever destroy your orator's vested rights and property and render its said property valueless by taking away from it said public lighting and also entering into competition with it for the private consumption of gas.

That the said ordinances and proposed action of said defendant's council impair the obligation of the contract entered into by said defendant with your orator, under which the said gas works of your orator were constructed and the investments of your orator's property were made, contrary to the provisions of sec. 10, article 1, of Constitution of the United States.

And if carried into effect will destroy the value of your orator's property and convert the same to the use of said defendant without due process of law, in violation of the provisions of the 14th amendment to the Constitution of the United States.

And your orator further says that no provision is made in the ordinances passed by defendant's council or either of them for compensation to your orator for its property so taken and appropriated for public use, but that if said ordinances are permitted to be carried into effect the property of your orator will be taken and appropriated to public use without compensation to your orator, in violation of the provisions of the Constitution of the United States.

Your orator therefore humbly prays your honors that the said defendant, The City of Hamilton, its mayor and city council,
10 may be restrained and enjoyned from proceeding to remove said lamp posts or disconnect the same from your orator's street mains or from lighting said city of Hamilton by any means or process other than that of your orator's gas, and that the said city, its mayor and council, may be enjoined and restrained from issuing the bonds of the said city for the purpose of erecting gas works in said city or for the purpose of providing such gas works for the supply of gas for lighting the streets, lanes, alleys, public buildings and places, and the private consumers of gas with gas in said city, and that such injunction may upon the final hearing hereof be made perpetual, and that your orator may have such other and further relief in the premises as the nature of its case shall require and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction firmly restraining and enjoining said defendant, The City of Hamilton, its mayor and council, from removing or causing to be removed the lamp posts aforesaid, the lamps and burners thereon, or in any way disconnecting the same from the street mains of your orator, and also from proceeding to light the streets, alleys, lanes, public buildings and places of said city by any means other than your orator's gas, and also enjoining and restraining them and each of them from issuing the bonds of said city for the purpose of providing means to erect gas works and from erecting gas works in said city, and also that a writ of subpœna may issue for the said defendant, and for such other and
11 further relief as the nature of your orator's case may require.

THE HAMILTON GAS-LIGHT
AND COKE CO.,
By THOS. MILLIKIN,
A. F. HUME,
JNO. F. NEILAN, AND
FOLLETT, HYMAN AND KELLEY,
Its Attorneys.

STATE OF OHIO, *Hamilton County,* } ss:

On the — day of January, 1889, before me personally appeared Joseph Andrews, a director of complainant, and made oath that he has read the above bill subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes them to be true.

JOSEPH ANDREWS.

Subscribed in my presence and sworn to before me this 7th day of January, 1889.

B. R. COWEN, *Clerk.* [SEAL.]

And afterwards, to wit, on the 7th day of January, A. D. 1889, there was issued out of the clerk's office of said court the following subpœna, directed to the marshal of the district. Said subpœna is clothed in the words and figures following, to wit:

Subpœna.

12 UNITED STATES OF AMERICA, *Southern District of Ohio,* } ss:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon The City of Hamilton, Butler county, State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against it by The Hamilton Gas-Light and Coke Company, a corporation and citizen of and resident in the State of Ohio. Hereof you are not to fail, under the penalty of the law thence ensuing; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of January, A. D. 1889, and in the 113th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.* [SEAL.]

MEMORANDUM.—The said defendant is required to enter its appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1889; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

13 And afterwards, to wit, on the 7th day of January, A. D. 1889, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States for the Southern District of Ohio, Western Division, *ss:*

THE HAMILTON GAS-LIGHT AND COKE COMPANY
vs.
THE CITY OF HAMILTON. } # 4211.

Cost bond.

I hereby acknowledge myself security for costs in this case.
JOSEPH ANDREWS. [SEAL.]

Taken and acknowledged before me this 7th day of January, 1889.
ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Joseph Andrews, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.
JOSEPH ANDREWS.

Sworn to and subscribed before me this 7th da- of January, A. D. 1889.
ROB'T C. GEORGI,
Dep. Cl'k U. S. Circuit Court, S. D. O. [SEAL.]

14 And afterwards, to wit, on the 7th day of January, A. D. 1889, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

United States Circuit Court, Southern Dist. of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE COMPANY, Complainant,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, Defendant.

Motion for temporary injunction.

Said complainant now comes and moves the court to grant a temporary injunction, as prayed for in the bill of complaint filed herewith.

HOS. MILLIKIN,
A. F. HUME,
J. F. NEILAN, AND
FOLLETT, HYMAN AND KELLEY,
Attorneys for Complainant.

And afterwards, to wit, on the 7th day of January, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 156.

Upon motion of the plaintiff and for good cause shown it is ordered that a temporary restraining order be issued herein upon the complainant filing a bond, by its president, in the sum of $1,000,
with good and sufficient sureties, to be approved by the clerk
15 of this court, enjoining and restraining the defendant as prayed in the bill of complaint, the same to continue in force until the complainant's motion for a temporary injunction, this day filed, shall be heard and disposed of. Affidavits in support of the motion may be filed on or before January 9th, 1889, affidavits on behalf of the defendant on or before January 11th, and affidavits in rebuttal on January 12. The motion for a temporary injunction is set for hearing on Tuesday, January 15, at 10 o'clock a. m.

And afterwards, to wit, on the 7th day of January, A. D. 1889, the following injunction bons was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Injunction Bond.

UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, }

Know all men by these presents that the Hamilton Gas-Light and Coke Company, a corporation, as principal; John P. Tweed and David Andrews, as sureties, — held and firmly bound unto the City of Hamilton, Butler county, State of Ohio, in the sum of one thousand dollars; to the payment of which they bind themselves, their heirs, executors, and administrators, firmly by these presents.

Sealed with their seals and dated this 7th day of Jan'y, A. D. 1889.

The condition of the above obligation is such that whereas the
Hamilton Gas-Light and Coke Co., a corporation, citizen of
16 the State of Ohio, having filed on chancery side of the circuit court of the United States for the southern district of Ohio a bill against the said The City of Hamilton, Butler county, State of Ohio, and having obtained an allowance of restraining order as prayed for in said bill *from* restraining the said defendant as prayed for in said bill:

Now, if the said The Hamilton Gas-Light and Coke Company, a corporation, shall abide the decision of said court and pay all moneys and costs which shall be adjudged against — in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

JOHN P. TWEED. [SEAL.]
DANIEL ANDREWS. [SEAL.]

Signed and sealed in presence of—
ROB'T C. GEORGI.
B. E. DILLEY.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, John P. Tweed, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

JOHN P. TWEED.

Sworn to before me the 7th day of January, 1889.

ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

17 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Daniel Andrews, one of the surities above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Butler, in said dirtrict.

DANIEL ANDREWS.

Sworn to before me the 7th day of January, 1889.

ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

And afterwards, to wit, on the 7th day of January, A. D. 1889, there was issued out of the clerk's office of said court the following restraining order, clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the 6th judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand
18 eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth.

Present: The Hon. Geo. R. Sage, district judge.

On Monday, the 7th day of January, A. D. 1889, among the proceedings had were the following, to wit:

THE HAMILTON GAS-LIGHT AND COKE CO.
vs.
THE CITY OF HAMILTON, Butler County, State of Ohio. } # 4211. In Equity.

Upon the motion of the plaintiff and for good cause shown it is ordered that a temporary restraining order be issued herein upon the complainant filing a bond, by its president, in the sum of $1,000, with good and sufficient sureties, to be approved by the clerk of this court, enjoining and restraining the defendant as prayed in

the bill of complaint, the same to continue in force until the complainant's motion for a temporary injunction, this day filed, shall be heard and disposed of. Affidavit in support of the motion may be filed on or before January 9th, 1889, affidavits on behalf of the defendant on or before January 11th, and affidavits in rebuttal on January 12. The motion for a temporary injunction is set for hearing on Tuesday, January 15th, at 10 o'clock a. m.

19 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing order is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at the city of Cincinnati, O., this 7th day of January, A. D. 1889.

B. R. COWEN, *Clerk.*

20 And afterwards, to wit, on the 9th day of January, A. D. 1889, came the marshal to whom the above subpœna was in form directed and returned the same into the clerk's office, with his proceedings thereon endorsed as follows, to wit:

Marshal's Return.

Received this writ at Cincinnati, Ohio, on the 7th day of January, 1889, and on the same day, at Hamilton, Ohio, I served the within-named The City of Hamilton, Butler county, State of Ohio, by handing to Alexander Getz, the mayor, and to John Disk, the president of its council, respectively, a true copy of this writ, having all the endorsements thereon; and on the same day and at the same place I handed to Alexander Getz, the mayor of said city, a true copy of the bill of complaint filed in this cause.

H. C. URNER,
U. S. Marshal,
By C. A. COSTELLO, *Deputy.*

Fees:

3 services	$6 00
3 copies	1 50
27 miles	1 62
	$9 12

And afterwards, to wit, on the 9th day of January, A. D. 1889, came the marshal to whom the above restraining order was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed as follows, to wit:

Restraining Order Returned.

21 Received this writ at Cincinnati, Ohio, on the 7th day of January, 1889, and on the same day, at Hamilton, Ohio, I served the within-named The City of Hamilton, Butler county, State of Ohio, by handing to Alexande- Getz, the mayor, and to John Dirk, the president of its council, respectively, a true copy of this writ, having all the endorsements thereon.

H. C. URNER,
U. S. Marshal,
By C. A. COSTELLO, *Deputy.*

2 services	$4 00
2 copies	1 00
27 miles	1 62
	$6 62

22 And afterwards, to wit, on the 9th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of complainant, clothed in the words and figures following, to wit:

Affidavit of Jos. Andrews, &c.

In the Circuit Court of the United States, Southern District of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE COMPANY, a Corporation, Complainant,
vs.
THE CITY OF HAMILTON, Butler County, State of Ohio, Defendant.

Affidavits of Joseph Andrews, Daniel Andrews, and Daniel H. Hensley.

STATE OF OHIO, *Butler County,* } *ss:*

Joseph Andrews, Daniel Andrews, and Daniel H. Hensley, being first duly sworn, say that they and each of them are and for about eighteen years last past have been officers, managers, and connected with the management and control of the Hamilton Gas-Light and Coke Company; that the said The Hamilton Gas-Light and Coke Company is a corporation duly organized under the laws of the State of Ohio in the year 1855, a copy of its certificate of incorporation being hereto attached, marked "Exhibit A."

Affiant- further say that the said corporation was organized for the purpose of manufacturing and supplying gas to light the streets, alleys, public grounds and buildings of said city, and to sup-
23 ply gas for the general use of said city and its its inhabitants; that on the 9th day of July, 1885, said city, by its council, duly passed an ordinance whereby it granted to said corporation

the right and authority to use and occupy its streets, lanes, alleys, and public grounds for the purpose of laying therein its pipes and gas mains for the purposes aforesaid, in accordance with the laws of the State of Ohio in such case made and provided; and on the 9th day of August, 1885, said city council, by an ordinance duly passed, declared said gas works to be highly beneficial to its citizens, and to aid in the successful organization of the same and encourage others to take its stock said city became a stockholder therein and paid into the treasury thereof five thousand ($5,000.00) dollars, being the par value of one hundred shares of its said stock, and in said ordinance reserved the right to appoint at all times one of its own members to vote said stock at all meetings of stockholders of said company, and a member of said council was elected one of *of* the directors of said company, and said council was represented in said board of directors until such time as the said city sold out its stock in said company, and said ordinances went into full operation and effect and said city assumed all the duties and obligations and exercised all the privileges of a stockholder and received all the benefits and advantages derived therefrom so long as it owned said *said* stock.

Affiant- further say that said gas Co. accepted the terms and conditions of said ordinance and at once entered upon the dis-
24 charge of the duties imposed upon it by the laws of the State of Ohio, its charter, and said ordinances, and ever since said date it has fully executed all said duties as required by the laws of Ohio in such case made and provided governing and regulating gas companies, and that it has never regulated any of the provisions of its said charter or the requirements of said laws, and that its rights acquired under said charter have never been impaired or lost by any judicial authority whatever, and that the same still remain to said company in full force and effect.

Affiant- further say that, relying upon the laws of the State and the authority vested by them in municipal corporations and relying upon said ordinances, said company has incurred great expense of time and money in erecting buildings and furnishing them with the necessary machinery and appliances for the manufacture of gas and in purchasing and laying down in said streets, public buildings and grounds, and all other public places within said city, by order of said council, all the necessary mains and pipes for the delivery and distribution of its gas for the purpose of public and private lighting as aforesaid.

That said company is now and had been at all times ready, able, and willing to discharge all the duties imposed upon it by its charter and the laws of this State and the orders and resolutions of said council.

Affiants further say that for more than thirty years last past said city has accepted the services of said company in furnishing
25 said gas for the purposes aforesaid, by authority of said laws, and has repeatedly from time to time exercised the power conferred by said laws upon municipal corporations; has repeatedly during said time fixed the price which said company should charge for its gas so furnished to light said streets, alleys, public grounds,

and building- and the price it should charge for gas furnished to its inhabitants, which orders, ordinances, and resolutions said company has always obeyed; that said city appointed a gas inspector, as provided by law, and has repeatedly from time to time during the past thirty years compelled said company, by authority of said laws, to lay its mains in the different streets of said city, and there are at present buried in said streets, by orders of said council, about thirty miles of said gas mains and pipes for the distribution of gas to light said streets and public grounds and buildings and to make the necessary connections therewith.

That said mains now form a net-work of iron pipes extending all over said city, from its center to its extreme corporate limits, in every direction and throughout its three and one-half square miles of territory.

That said council has compelled said company to lay its mains along streets of said city, on many parts of which for long distances there is no habitation, residence, or building of any kind whatever, and along many of which there is no private consumption of gas whatever, said mains being laid exclusively for the purpose
26 of conveying gas for public lighting alone, of all which facts said council had knowledge at the time — so ordered said mines laid as aforesaid.

Affiants further say that by orders and directions of said council said gas company has erected upon its said *k*ains and connected therewith five hundred and thirty-two (532) public lamp posts, with lamps, burners, and all other appliances complete, and that said lamp posts are now connected with its said mains and all are in connection with its works for the manufacture of gas, and it is fully able to supply all the needs of said city and its inhabitants with all the gas they require for all kinds of lighting and for all purposes for which gas is used in said city, and that said company has never neglected or refused to furnish the same when required by either said city or its inhabitants or to lay said mains when duly notified by authority of said council, of which willingness and ability said company has notified said council since January 1, 1889.

Affiant- further says that on the 27th day of Nov., 1883, the council of said city duly passed an ordinance, a copy of which is hereto attached, marked Exhibit E, whereby it fixed the price which said company should charge and receive for its gas furnished to light said city and furnished to its inhabitants for the period of five years from and after the 1st day of January, 1884, which ordinance imposed the laying of certain mains by said company in streets of said city as a condition precedent to the going into effect of said ordinance, which mains were required exclusively for the delivery
27 and distribution of gas for streets lamps, there being no dwellings along a great portion thereof. To the terms and conditions of said ordinance said company assented by its written acceptance thereof filed in the office of the clerk of said city, as required by law, and which remained in full force until January 1, 1889, and that during the time said ordinance was in force said company,

under the order and direction of said city council, laid about eight miles of street mains as aforesaid.

Affiants further say that all said gas works, machinery, appliances, and fixtures and all said gas mains, pipes, and connections therewith buried in the ground and connected as aforesaid with said street lamps are the property of said company, and that all said lamp posts, lamps, and burners therein are the property of said city; and affiants say that said property of said company is of great value if used for the purposes for which it was constructed; that it cannot be used or applied to any other purpose where it is and cannot be removed for use to any other location and is of no value and will be wholly lost to said company and entirely destroyed unless its present use is continued.

Affiants further say that said city, by its council, on January 2, 1889, notified said company that said city would no longer use any of said company's gas to light its streets or public buildings—not use any of said gas for any purpose—and would not pay for any gas furnished by said company for any such purpose after January 1, 1889, and would not allow or permit said company to use any of the said street lamps or posts in connection with said company's mains for the purpose of being used to light said streets,
28 public grounds, or places within said city, and ordered said company to remove without delay all attachments and connections between said mains of said company and said lamp posts of said city, and, by resolution, ordered and directed its servants and employés to light its public buildings by some other means than by said company's gas, a copy of which order is hereto attached, marked "Exhibit B."

Affiants further say that said city proposes and intends to light its streets, public grounds, and all its public places within said city by some other means than by said company's gas, and, to enable it more fully to carry out said intention and to destroy said company's property and investments so acquired and made under the laws of said State of Ohio and the ordinances of said city of Hamilton, it has already passed an ordinance, a copy of which is hereto attached, marked "Exhibit C," to issue one hundred and fifty thousand ($150,000.00) dollars of its bonds to erect gas works of its own and to manufacture gas to be used *to be used* to light all its streets, public grounds and buildings, and all public places within said city, and lay gas mains in said streets, including the streets on which said company's gas mains are already laid, under the orders and directions of the council of said city as aforesaid, and thereby forever deprive said company of all right to manufacture and supply gas for said public lighting, and said city now threatens to remove and will remove and disconnect all said lamp posts and other
29 fixtures from their attachments with said company's mains and threatens to temporarily light said streets, public buildings and places, with some other means than said company's gas until it builds its said works and lays it said mains, and then threatens to forever deprive said company of all rights acquired by its charter and forever destroy its vested rights and property and

render its said property valueless by taking away from it said public lighting, and also by entering into competition with it for the private consumption of gas.

That the said ordinances and proposed action of said city council impair the obligations of the contract entered into by the said city with said company under which the said gas works of said company were constructed and the investments of said company's property were made, and if carried into effect will destroy the value of said company's property — the same to the use of said city without due process of law.

Affiants further say that no provision is made in the ordinance passed by said city council or either of them for the compensation to said company for its property so taken and appropriated for public use, but that if said ordinances are permitted to be carried into effect the property of said company will be taken and appropriated to public use without compensation.

Affiant- further say that for the purpose of showing the authority and control exercised over the said gas companys since its establishment in said city they attach hereto copies of various ordi-
30 nances, orders, and resolutions passed by the council of said city in the exercise of its control over and direction to said gas company, marked "Exhibit D," all of which have been fully complied with by said company; and affiants further say that said council claimed authority to pass said ordinances, Exhibit "C," by virtue of authority conferred by a vote of the electors of said city at the November election, 1888, claiming that at said election 2,412 electors voted for the issue of said bonds, and 59 against the same, but affiants aver that at said election 3,882 votes were cast for State and county officers.

Affiant- further say that on January 4, 1889, they served a notice upon the council of said city, a copy of which is hereto attached, marked and made a part hereof as Exhibit "F;" and further affiants saith not.

JOSEPH ANDREWS.
DANIEL ANDREWS.
D. H. HENSLEY.

Signed and sworn to *be* affiants before me this 8th day of January, 1889.

CHAS. P. HAINES,
Notary Public, Butler County, Ohio. [SEAL.]

40c., paid by affiants.

31 EXHIBIT "A."

Charter.

The undersigned have associated themselves together as a corporation for the purpose herein expressed.

The name of said company and by which it shall be known shall be "The Hamilton Gas-Light and Coke Company."

Said company is formed for the purpose of supplying gas for lighting buildings, the streets, and public and private buildings of the city of Hamilton, in Butler county, Ohio. The amount of the capital stock of said company shall be fifty thousand dollars, each share shall consist of fifty dollars, and the operation of said company shall be carried on in the city of Hamilton, in Butler county, Ohio.

In witness whereof we have hereto set our hands and seals this sixth day of July, A. D. 1855.

EDWARD GWYN. [SEAL.]
JACOB SHOFFER. [SEAL.]
J. W. DAVIS. [SEAL.]
W. BECKETT. [SEAL.]
I. ROBERTSON. [SEAL.]
JAS. B. MILLIKIN. [SEAL.]
LEWIS D. CAMPBELL. [SEAL.]

Executed in presence of—
—— ——.

32 STATE OF OHIO, }
Butler County. }

Before me, a justice of the peace in and for Butler county, Ohio, came personally Edward Gwyn, Jacob Shoffer, J. W. Davis, W. Beckett, I. Robertson, J. B. Millikin, Lewis D. Campbell, the above-named persons who signed the above certificate, and acknowledged the same to be their voluntary act and deed for the uses and purposes mentioned therein.

In witness whereof I have hereto set my hand and seal this July 6, A. D. 1855.

[SEAL.] JAMES DAUGHERTY, *J. P.*

THE STATE OF OHIO, }
Butler County, } *ss* :

I, Michael C. Ryan, clerk of the court of common pleas of the county of Butler, in the State of Ohio, do hereby certify that James Daugherty, Esq., befor- whom the *written* or foregoing acknowledgment appear- to have been taken or made, was at the time of subscribing the same an acting justice of the peace, duly commissioned and qualified to keep the peace, within and for the said county of Butler; that full faith is due and ought to be given to all his official acts as such, and that his name subscribed thereto is of his own genuine signature.

In testimony whereof I, Michael C. Ryan, clerk of the court of common pleas of said county of Butler, have hereto set my hand and affixed the seal of our said court, at Hamilton, the 14th
33 day of July, one thousand eight hundred and fifty-five.

M. C. RYAN, *Clerk,*
By E. A. DALTON, *Deputy.* [SEAL.]

SECRETARY OF STATE'S OFFICE,
COLUMBUS, *July 16th*, 1855.

I, William Trevitt, secretary of state of the State of Ohio, do hereby certify that the annexed and foregoing copy of the certificate of association of "The Hamilton Gas-Light & Coke Company" is correctly copied from the original on file and remaining of record in this office.

[SEAL.] Witness my official signature and the great seal of the State of Ohio at the time and place above mentioned.

WM. TREVITT,
Secretary of State.

34 EXHIBIT "E."

An ordinance to regulate the price which the Hamilton Gas-Light and Coke Co. may charge and receive for gas furnished by it to the city of Hamilton, Ohio and to citizens thereof, for and during a period of five years from and after January 1st, 1884; and to repeal an ordinance entitled "An ordinance to regulate the price which the Hamilton Gas-Light & Coke Company may charge and receive for gas furnished by it to the city of Hamilton, Ohio, and to citizens thereof for and during a period of five years from and after July 16, 1883."

SECTION 1ST. Be it ordained by the city council of the city of Hamilton, Ohio, That for and during a period of five years from and after January 1st 1884 the minimum prices at which the city of Hamilton, Ohio, will require the Hamilton Gas-Light and Coke Co. to furnish coal gas of good quality and to average not less than fifteen (15) candle-power shall be as follows, to wit:

For gas of said quality and candle-power furnished by said company to light the public lamps erected upon the streets, avenues, lanes, alleys, bridges, and grounds of said city, one dollar and seventy-five cents ($1.75) for each and every one thousand (1000) cubic feet of gas so furnished, and:

35 For gas of said quality and candle-power furnished by said company to light the public buildings of said city two dollars ($2.00) for each and every one thousand (1000) cubic feet of gas so furnished, and:

For gas of said quality and candle-power furnished by said company to citizens of said city and measured through meters of standard excellence two dollars ($2.00) per each and every one thousand (1000) cubic feet of gas so furnished, if paid for within the first five (5) days of each month, with an addition of ten per cent. (10 %) if not paid for within that time, and—

For lighting, extinguishing, cleaning and keeping in repair said public lamps four dollars ($4.00) per post per annum, when in use by said city.

SECTION 2ND. That said city shall pay monthly upon bills to be rendered by said company for all gas so furnished to said city, and for lighting, extinguishing, cleaning and keeping in repair said public lamps, and shall furnish all material necessary to make such repairs and shall cause to be lighted and extinguished by said company for and during said period of five (5) years aforesaid the public

lamps now erected in said city and all other public lamps which may hereafter during said period be erected by order of said city from the time they are so erected to the end of said period according to the following:

36 *Time-Table for Lighting and Extinguishing Public Lamps in the City of Hamilton, O.*

Months.	Days.	Begin to light.		Begin to exting.		Months.	Days.	Begin to light.		Begin to exting.	
		Hrs.	*Min.*	*Hrs.*	*Min.*			*Hrs.*	*Min.*	*Hrs.*	*Min.*
	1	5	05	5	45		1	8	15	3	00
Jan'y.	6	5	10	5	45	July.	6	8	15	3	00
	13	5	20	5	45		13	7	55	3	15
	20	5	30	5	45		20	7	45	3	20
31 days.	27	5	35	5	45	31 days.	27	7	35	3	35
	to 31 inclusive.						to 31 inclusive.				
	1	5	35	5	45		1	7	35	3	35
Feb'y.	3	5	55	5	30	August.	3	7	30	3	45
	10	6	00	5	30		10	7	25	3	55
	17	6	05	5	25		17	7	15	4	00
28 days.	24	6	10	5	25	31 days.	24	7	05	4	15
	to 28	6	10	5	25		to 31				
	inclusive. 29 Add one day for leap year.						inclusive.				
	1	6	10	5	25		1	7	00	4	20
March.	2	6	15	5	15	Sept.	7	6	55	4	30
	9	6	25	5	00		14	6	40	4	30
	16	6	35	4	55		21	6	30	4	35
31 days.	23	6	45	4	45	30 days.	28	6	30	4	35
	30	7	00	5	00		to 30				
	to 31 inclusive.						inclusive.				
	1	7	00	5	00		1	6	15	4	40
April.	6	7	15	4	25	October.	5	6	05	4	45
	13	7	15	4	00		12	5	50	5	00
	20	7	15	4	00		19	5	45	5	05
30 days.	27	7	15	3	45	31 days.	26	5	40	5	15
	to 30 inclusive.						to 31 inclusive.				
	1	7	15	3	45		1	5	40	5	15
May.	4	7	30	3	30	Nov.	2	5	30	5	25
	11	7	35	3	20		9	5	25	5	25
	18	7	45	3	05		16	5	15	5	30
31 days.	25	7	50	3	05	30 days.	23	5	05	5	35
	to 31	7					to 30				
	inclusive.						inclusive.				
	1	8	00	2	55		1	5	00	5	40
June.	8	8	00	2	50	Dec.	7	4	55	5	45
	15	8	00	2	45		14	4	55	6	00
	22	8	15	2	45		21	4	55	6	00
30 days.	29	8	15	2	45	31 days.	28	4	55	5	55
	to 30						to 31				
	inclusive.						inclusive.				

and in case any of said lamps shall go out or fail to burn before twelve o'clock (12) p. m. without fault of said city then said lamps so going out or failing to burn shall not be measured or counted for such night, and in case any of said lamps go out or fail to burn after twelve (12) o'clock p. m. without fault of said company then said lamps going out or failing to burn shall nevertheless be measured and counted.

Each of said lamps shall be provided and equipped by said city with a four-foot (4) gas burner, and the amount of gas consumed in lighting said lamps shall be ascertained by multiplying four
37 (4) feet, the size of said burner, by the number of hours said lamps are so lighted according to said time-table.

SECTION 3RD. That the ordinance passed July 3, 1883, entitled "An ordinance to regulate the price which the Hamilton Gas-Light and Coke Co. may charge and receive for gas furnished by it to the city of Hamilton Ohio and to citizens thereof for and during a period of five (5) years from and after July 16, 1883" be and the same is hereby repealed.

SECTION 4TH. This ordinance shall take effect and be in full force from and after January 1st, 1884, providing the Hamilton Gas-Light and Coke Co. shall first have filed its written acceptance of the same with the city clerk and its written agreement to make as soon as practicable, the extension of gas, mains and establish lamp posts as set forth in a resolution locating and establishing lamp posts passed November 20th, 1883.

38 "EXHIBIT B."

CITY CLERK'S OFFICE, HAMILTON, OHIO, *Jan. 2nd*, 1889.

To the Hamilton Gas-Light & Coke Company, Hamilton, Ohio.

SIRS: At a regular meeting of the city council, held Tuesday evening, January 1, 1889, at 7.30 o'clock, at the council chamber, the following resolution was adopted by the following vote:

Yeas: Coakley, Dirk, Hunter, Black, Egry, Morrison, Reiss, Williamson—(8).

Resolution.

Whereas the contract heretofore existing between The Hamilton Gas-Light and Coke Company and the city of Hamilton for the lighting of the streets and public buildings of said city has on this the 1st day of January 1889, terminated by the expiration of time for which the same was to run, and there is now no contract existing between said company and said city for said lighting.

Therefore be it resolved by the city council of the city of Hamilton, Ohio That there is no longer any contract for said public lighting existing between said company and said city, and that the said city does not longer desire said company to furnish gas for lighting the streets and public places of said city and will not pay for any of said lighting after this date that may be furnished or attempted to

be furnished by said company and that said company is
39 hereby forbidden, the use of the lamp posts and other property of said city and is hereby notified to remove without delay any attachment or connection with said lamp posts and other property which it has heretofore mantained.

That the city clerk, be and he is hereby required and instructed to forthwith serve upon said company a copy of this preamble and resolution.

(Sig.) JOHN DIRK,
President of Council.

Adopted Jan'y 1, 1889.

Attest: (Sig.) J. J. McMAKEN, *City Clerk.*

I hereby certify *that* the foregoing to be a true copy.
J. J. McMAKEN, *City Clerk.*

You will therefore please consider the above true copy as the necessary and required notice ordered served upon you.
J. J. McMAKEN, *City Clerk.*

40 EXHIBIT "F."

Office of J. F. Neilan, attorney-at-law.

To the council of the city of Hamilton, Ohio.

GENTLEMEN: Your notice to the undersigned, the Hamilton Gas-Light & Coke Company, that you consider at an end, from and after January 1st, 1889, the contract between this company and your city for lighting the streets, public buildings and places in the city by this gas company, and that you would not take nor pay for any more gas manufactured and delivered by this company for the purpose of such lighting, and forbidden this company to longer use any of your property for the purposes of such lighting, and notifying this company to remove without delay any attachment or connection with your said property which it has heretofore maintained, is received.

In reply to which notice this company now enters its protest to and against your said action, and denies that the contract between it and your city is ended, or that you have any power, right, or authority to terminate said contract, or that said contract can be set aside except by the default of the company, judicially ascertained and declared by a court of competent jurisdiction, which has never been done or attempted.

41 This company hereby notifies you that it will hold your city for all damages that may accrue to it or its property by reason of your action, and that it will hold you responsible for all gas burned through your street lamps, whether lit by your authority or by the acts of any other person, and it waives no rights which it has in the premises.

It further notifies you that it is now ready, able, and willing to supply all gas needed to light all your streets, public buildings and

grounds, and all other public places in your city, according to the laws of this State in such case made and provided; that its gas mains, filled with gas, extend throughout all said streets, &c., as heretofore designated and required by you; that all said mains are connected with your lamp posts, lamps, and the burners thereon, and are all ready and fit for the purpose for which they were constructed and connected, and this company is ready now and at all times to supply all the gas needed for the wants of your city and its inhabitants and will furnish the same upon notice from you.

This company owns the mains through which said gas is furnished and distributed for said public and private lighting; you own the lamp posts, lamps, and burners connected therewith. You refuse to use said lamp posts or burners for the purpose for which they were constructed or permit this company to use them, and you refuse to use the authority vested in you by law, and as this company does not desire to put itself in the attitude of a trespasser by
42 using your property without your consent and against your will, and if your city is in total darkness and its inhabitants are subject to all the annoyances, discomforts, and dangers incident to such a condition of affairs the fault is yours and not this company's.

Respectfully,

THE HAMILTON GAS-LIGHT AND COKE COMPANY,
By D. H. HENSLEY, *Sec'y.*

January 4, 1889.

(Endorsed on cover:) Notice to city council. Jan. 4, '89. (Copy.) Served on J. J. McMaken, city clerk, at 3.20 p. m. D. H. Hensley.

43 EXHIBIT "C."

An ordinance to provide for the issue of bonds, for the purpose of erecting gas works.

Whereas, by authority of the Revised Statutes of Ohio wherewith it is desired to make any improvement of a local character or to erect gas works at the expense of the corporation, the council of any municipal corporation is empowered to issue and sell the bonds of such municipal corporation in amount and in denomination as may be deemed necessary for the special purpose in view; provided the question of issuing the said bonds shall first be submitted to the voters of the municipal corporation at a general election; thirty days' notice of which shall have been previously given by publication, stating the amount of bonds to be issued, the purpose for which they are to be issued and the time and places of holding the election.

And whereas, the question of issuing the bonds of the city of Hamilton, to the extent of one hundred and fifty thousand dollars ($150,000) for the purpose of erecting gas works by said city therein, to supply gas to said city and the citizens thereof was duly submitted to the voters of

the city of Hamilton, at a general election held in said city on the 6th day of November A. D. 1888 an- after due notice given under and by authority of an ordinance of said city of Hamilton, providing for the same entitled "An ordinance providing for the submission to the qualified voters of the city of Hamilton, Ohio, the question of issuing the bonds of said city to the extent of one hundred and fifty thousand dollars ($150,000) for the purpose of erecting
44 gas works by said city" passed Sept. 4, 1888 and the two thousand four hundred and seventy-one voters, voting at said election upon the question of issuing said bonds, two thousand four hundred and twelve voters, voted for the issue of bonds, and fifty-nine voters, voted against the issue of bond-. Therefore—

SECTION I. Be it ordained by the city council of the city of Hamilton, Ohio, that for the purpose *the* providing the necessary means for the erection of gas works, by said city therein, to supply gas to the city and the citizens thereof, the mayor of said city and the city clerk be and are hereby authorized and empowered in the name and for the city of Hamilton, to execute and issue negotiable coupon bonds, dated Feb. 1, 1889 to the amount of one hundred and fifty thousand dollars ($150,000) in the denomination of one thousand dollars ($1,000) each, in two series of fifty thousand dollars ($50,000) and one hundred thousand dollars ($100,000) to be known and designated respectively as series "A" and series "B."

Series "A" to run from ten to nineteen years and series "B" to run from twenty to twenty-nine years, from the rate of issue bearing interest at the rate of (5) five per cent per annum payable semi-annually, represented by interest coupons.

Said bonds and interest coupons to be payable at the office of the city treasurer of the city of Hamilton Ohio.

45 Said bonds to be signed by the mayor of the city of Hamilton, and the city clerk thereof, under seal of the city of Hamilton, and the coupons to be signed by the city clerk.

For the payment of the said bonds and the interest coupons the revenues, faith and all real and personal property of the said city are hereby pledged.

SEC. II. Said bonds shall be issued in the order of the service above named and designated and be made payable as follows:

Series "A."

$5,000,	on the	1st	day of	February, 1899.
$5,000,	"	"	"	1900.
$5,000,	"	"	"	1901.
$5,000,	"	"	"	1902.
$5,000,	"	"	"	1903.
$5,000,	"	"	"	1904.
$5,000,	"	"	"	1905.
$5,000,	"	"	"	1906.
$5,000,	"	"	"	1907.
$5,000,	"	"	"	1908.

46 *Series "B."*

$10,000,	on the	1st	day of	February, 1909.
$10,000,	"	"	"	1910.
$10,000,	"	"	"	1911.
$10,000,	"	"	"	1912.
$10,000,	"	"	"	1913.
$10,000,	"	"	"	1914.
$10,000,	"	"	"	1915.
$10,000,	"	"	"	1916.
$10,000,	"	"	"	1917.
$10,000,	"	"	"	1918.

Provided, That the privilege is reserved to said city to redeem any bond or bonds of series "B" at any time after the 1st day of February, 1909; and if so redeemed interest thereon shall cease from and after the date of redemption.

SECTION III. Said bonds are to be issued in such amounts and at such times as counsel may at its option and by resolution designate and require from time to time and whenever any or all of said bonds shall be for sale, not less than thirty days' (30) previous notice shall be given by the city clerk in two newspapers of general circulation in Butler county, Iowa, where said municipal corporation is situated and in one or more newspapers published outside of said county, in the State of Ohio, until the day of sale.

47 The advertisement shall specify that sealed bids will be received at the office of the city clerk until a day and hour therein designated and shall set forth the nature, amount, rate of interest and length of time the bonds have to run; and the bonds shall be sold at not less than their par value to the highest and best bidder, unless the city counsel shall reject all bids; and the sums realized from such sales shall be paid into the city treasury for the purpose above named.

SECTION IV. The city clerk shall make and keep an accurate registry and account of the issuing and payment of said bonds and coupons and of all moneys derived from the sale of said bonds.

SECTION V. This ordinance shall take effect and be in force from and after ten days after its first publication.

Passed December 18, 1888.

(Sig.) JOHN DIRKE,
President of City Council.

Attest:
(Sig.) GEO. A. MILLER,
City Clerk pro Tem.

48 EXHIBIT "D."

Copy.

Minute Book # 1, p. 35.

An ordinance to provide for establishing gas-light works in the city of Hamilton, Ohio.

SECTION 1. Be it ordained by the city council of the city of Hamilton, That the Gas-Light and Coke Co. be and they are hereby authorized to use the streets, lanes alleys and public grounds of said city for the purpose of laying down pipes for the conveyance of gas, in and through said city, for the use of said city and its inhabitants.

SECTION 2. Be it further ordained, That all injuries done to said streets, alleys, sidewalks or public grounds or other property of said city by said company by excavation or otherwise shall be repaired by said company with due diligence and the same be left and kept in as good condition as before said injury was done.

SECTION 3. Be it further ordained, That said company shall have the exclusive privilege of laying pipes for conveying gas in said city and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years from the passage of this ordinance.

SECTION 4. Said company shall not charge for the use of gas that it may furnish to said city or any of the inhabitants a price greater than is from time to time during said twenty years, usually charged for the same in cities of a similar size and with like facilities for the making and furnishing of gas.

SECTION 5. If the gas works for manufacturing said gas
49 shall be located within the corporate limits of said city of Hamilton, the council of said city at the time said works are being erected, shall have the privilege of approving the location.

SECTION 6. That all the privileges hereby granted shall be null and void, unless the said gas works shall be erected and at least one mile of main pipe be laid within two years from the passage of this ordinance.

Passed July 9, 1855.

50 Minute Book # 1, page 348.

Resolution.

Resolved, That the Hamilton Gas-Light and Coke Co. be and are hereby requested to place a sufficient number of lamp posts on Fourth street to correspond with other streets on disposition and distance.

Adopted July 1, 1858.

Minute Book # 1, page 362.

Resolution.

Resolved That the Hamilton Gas-Light and Coke Co. be instructed to place lamp posts at the regular points on First street from *from* Basin to Sycamore streets.

Adopted Aug. 30, 1858.

Minute Book # 1, page 362.

Resolution.

Resolved That the Hamilton Gas Company be and it is hereby directed to erect according to the general plan adopted throughout the city, gas-lamp posts and lanterns on the late extention of street pipe on Ross and Third streets in the First ward, and on Second street in the Third ward and one post on Henry street in the Second ward of the city according to the petitions of the citizens thereon.

Adopted Nov. 15, 1860.

Minute Book # 1, page 693.

Resolution.

51 Resolved That the Hamilton Gas-Light and Coke Co. are hereby instructed to put up gas posts in regular order along 3d street between Buckeye and Vine Sts. in 3d ward and on same street between Ludlow and Sycamore streets in the 2nd ward of the city of Hamilton; also two posts at the intersection of 2nd and Heaton streets in the 3rd ward of Hamilton.

Adopted March 2, 1863.

Minute Book # 2, page 35.

Resolution.

Resolved, That the Hamilton Gas-Light and Coke Company of Hamilton are hereby requested to lay their *their* gas pipes on Second street in the 1st ward from Ross St. to the 1st-ward engine-house, and also to put up a gas post and lantern at the south corner of the alley near the said engine-house *in* said pipe to be laid in 30 days from this date.

Adopted Oct. 11, 1864.

Minute Book # 2, page 81.

Resolution.

Resolved, That the gas company be and hereby are authorized to put up lamp posts at corner of 3rd and Dayton Sts., one at Front street near the school-house and one on Basin street between 2nd and 3rd streets and corner of 3rd and Ludlow.

Adopted June 12, 1865.

52 Ordinance Book # 1, page 320.

An ordinance to extend gas lights in the city of Hamilton.

SECTION 1. Be it ordained by the city council of the city of Hamilton, That the gas be extended on Front street in the First ward commencing at its present terminus south of Ross street southwardly to the south side of South street and that the city of Hamilton erect five new lamp posts on said extention, also that the gas be extended on Front St. 2nd ward to Chestnut and that there be erected 8 lamp posts, also be extended on Second street 2nd ward to Washington street and that there be erected 13 lamp posts and extended on 3rd street to Cincinnati pike, and that there be erected 5 additional lamp posts, also on 4th street 2nd, ward to Walnut street and there be erected five additional lamp posts and that the gas be extended on Fifth street to Cincinnati pike and there be erected 7 additional lamp posts and that the gas be extended in Second street to Mill St. 3rd ward and have 5 additional lamp posts also on Main St. 1st ward, have 6 additional lamp posts.

That the aforesaid extension is made in accordance with the ordinance under which the streets are now lighted and to be grounded in every respect by the afore ordinance in the same manner and under the same limitations as is provided as *is* to other streets now lighted.

Passed July 6, 1867.

53 Minute Book # 2, page 387.

On motion *of* the gas company were instructed to erect six lights on the suspension bridge two at each end and two in center.

May 12, 1868.

Minute book # 3, page 18.

Resolution.

Resolved, That the Hamilton Gas-Light and Coke Co. be instructed to continue their gas pipe from 3rd and 4th streets on Canal street in the 2nd ward of Hamilton and to erect 1 lamp post in the center of said Canal street between 3rd and 4th streets under the direction and control of the committee on gas of the city council.

Adopted Nov. 30, 1869.

Minute Book # 3, page 165.

Resolution.

Resolved, by the city council of the city of Hamilton That the Hamilton Gas-Light and Coke Company be authorized to extend the gas pipes on Ludlow street, from First street to Water street; thence north to Basin St. in the 2nd ward in the city of Hamilton, also on Dayton St. in the 3rd ward from 5th St. east to 8th St. under the same rules and regulations and at the same price that gas pipes are laid down and lamp posts are erected in other parts of the city.

Adopted Nov. 15, 1870.

54 Ordinance Book # 1, page 99.

An ordinance authorizing and empowering the Hamilton Gas-Light and Coke Company to lay main pipe and erect lamp posts.

SECTION 1. Be it ordained by the city council of the city of Hamilton, That the Hamilton Gas-Light and Coke Co. be and are hereby authorized, empowered and required to lay main pipe and erect lamp posts on Canal street from 4th St. to 9th St. on East Ludlow street from the railroad to 10th St. and on Sycamore St. from 5th to 7th—and in the 4th ward; also lay main pipe from their wo*krs* eastwardly on High St. to 7th street and northwardly on 7th street to Heaton street and to erect 9 lamp posts on 7th street and 5 lamps on 3rd street in the 3rd ward, in accordance with resolutions of the board of improvements.

Passed October 31, 1871.

Ordinance Book # 1, page 131.

Resolution declaring it necessary to erect (2) gas posts on Water street 3rd ward.

Resolved That in the opinion of two-thirds of the members elected to the board composing the common council of the city of Hamilton it is necessary to erect two (2) gas posts on Water street between Stable street and Dayton street 3rd ward (such improvement being recommended by the board of improvements.)

Adopted Oct. 1, 1872.

55 Ordinance Book # 1, page 99.

An ordinance authorizing and empowering the Hamilton Gas-Light and Coke Company to lay main pipe and erect lamp posts.

SEC. 1. Be it ordained by the city council of the city of Hamilton, Ohio That the Hamilton Gas-Light and Coke Co. be and are hereby authorized, empowered and required to lay main pipe and erect lamp posts on Canal St. from 4th St. to 9th St. on East Ludlow St. from the railroad to 10th St. & on Sycamore St. from 5th to 7th St. in the 4th ward. Also to lay main pipe from their works, eastwardly on High St. to Seventh street and northwardly on 7th street to Heaton St. and to erect nine lamp posts on 7th street and 5 lamps on 3rd street in the 3rd ward in accordance with resolutions of the board of improvement, dated October 2, 1871.

Passed October 31, 1871.

Ordinance Book # 1, page 132.

An ordinance providing for the extention of gas main and erection of lamp posts on 3rd street, 3rd ward, from the north line of Niles tool works, premises northward to north line of the Cope and Maxwell Manufacturing Co.'s premises.

SECTION 1. Be it ordained by the city council of the city of Ham-

ilton, Ohio, That the gas main on Third street, 3rd ward, be
56 extended from the north line of Niles tool works premises to the north line of the Cope and Maxwell Man'f'g Co.'s premises and that lamp posts be erected on said space at the usual intervals under the direction of the committee on gas.

Passed October 15, 1872.

Ordinance Book #1, page 155.

Resolution authorizing the Hamilton Gas-Light and Coke Co. to erect three lamp posts and furnish a lamp and all necessary fixtures for each of said posts on 5th street between High and Dayton Sts. 3rd ward.

Be it resolved by the city council of the city of Hamilton, Ohio That the Hamilton Gas-Light and Coke Co. be and is hereby authorized to erect 3 lamp posts of the same size and pattern of those now in use and furnish a lamp and all necessary fixtures for each of said posts, on 5th street between High and Dayton streets 3rd ward.

Said posts to be erected at the following points & places to wit: One post to be erected midway between High and Butler Sts. one at the intersection of Butler and 5th streets and one at a point midway between Butler and Dayton streets.

Adopted April 28, 1873.

57 Ordinance Book #1, page 155.

Resolution authorizing the Hamilton Gas-Light and Coke Co. to erect on Ross street between 4th and 6th Sts. 1st ward 5 lamp posts and furnish all necessary fixtures for each of said posts.

Be it resolved by the city council of the city of Hamilton That the Hamilton Gas-Light and Coke Co. be and is hereby authorized to erect on Ross St. between 4th and 6th streets 1st ward 5 lamp posts and furnish a lamp and all necessary fixtures for each of said posts.

Said posts to be erected at the following points and places to wit, One post at alley midway between 4th and 5th streets 2 at intersection of 5th street, one at alley midway between 5th and 6th streets and one at intersection of 6th street.

Adopted April 28, 1873.

Ordinance Book #1, page 167.

Resolution providing for the erection of 3 lamp posts on 4th and Boudinot streets, 1st ward city of Hamilton.

Be it resolved, by the city council of the city of Hamilton, That the Hamilton Gas-Light and Coke Company be and is hereby authorized & required to erect three gas-lamp posts and furnish a lamp and all necessary fixtures for each post at the following points to wit: One gas-lamp post on 4th street at alley midway between
58 Main and Boudinot streets, one lamp *lamp* post at southeast

corner of 4th and Boudinot St. one lamp post at northwest corner of Boudinot and North Sts.

Be it further resolved That said lamp posts and lamps shall be of the same size and pattern as those set and now standing and in use in the city of Hamilton.

Passed June 9, 1873.

Ordinance Book # 1, p. 204.

An ordinance to authorize the Hamilton Gas-Light and Coke Company to erect four (4) lamp posts on Water street in the 2nd ward of the city of Hamilton.

SECTION 1. Be it ordained by the city council of the city of Hamilton Ohio (two thirds of all the members elected to council concurring) That the Hamilton Gas-Light and Coke Company be and is hereby authorized and instructed to erect 4 gas posts on Water street in the 2nd ward of the city of Hamilton at the following points to wit: One post corner of Ludlow and Water streets one post at alley midway between Ludlow and Sycamore streets, two posts corner of Water and Sycamore streets.

Passed January 5, 1874.

Ordinance Book # 1, page 210.

Resolution authorizing the Hamilton Gas-Light and Coke Company to lay gas mains and erect lamp posts in the 4th ward city of Hamilton.

Resolved by the city council of the city of Hamilton, That
59 the Hamilton Gas-Light and Coke Company be and are hereby authorized to lay mains and erect the necessary lamp posts on the following named streets to wit:

On 7th street from Canal to Sycamore street on Sycamore street from 7th to 8th street and on 8th street southwardly to 4th-ward school-house in the 4th ward city of Hamilton.

Passed March 23, 1874.

Ordinance Book # 1, page 437.

An ordinance to extend gas mains along Washington street from 2nd street to Cincinnati pike and to light a lamp on said street.

SECTION 1. Be it ordained by the city council of the city of Hamilton Ohio, That the Hamilton Gas-Light and Coke Company be authorized to extend their gas mains along Washington street from 2nd street to Cincinnati pike in the 2nd ward of said city and that they be instructed to erect one lamp post on said Washington street about the middle of the square and to light the same according to the present existing gas contract.

Passed December 30, 1878.

Ordinance Book # 1, page 436.

An ordinance for the extension of gas mains and the erecting of lamp posts and lighting same on Front street 1st ward from Boudinot St. to a point opposite Clark & Co.'s saw-mill.

60 SECTION I. Be it ordained by the city council of the city of Hamilton, Ohio That the Hamilton Gas-Light and Coke Co. be authorized to extend the gas mains on Front street, 1st ward, from Boudinot street to a point opposite Clark & Co.'s saw-mill.

SECTION II. They are hereby authorized to erect posts one hundred and thirty-three feet apart, and light same according to gas contract existing at present time.

SECTION 3. This ordinance shall be in full force from and after its passage.

Passed December 30, 1878.

Ordinance Book # 1, page 438.

An ordinance providing for the laying and extention of gas mains in the 1st ward.

SECTION 1. Be it ordained by the city council of the city of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. are hereby authorized to extend and lay their gas mains along Boudinot street, from Front street to 5th St. and on 5th St. from Boudinot street to Main street and along Main street to where said Main street intersects with the Eaton and Millville turnpike and along the Eaton road to Boudinot street.

SECTION 2. Said gas-light and coke Co. are hereby authorized to erect the usual number of posts along said route and to light the same according to gas contract existing at the present time.

61 SECTION 3. This ordinance shall be in force and effect from and after its passage.

Passed January 13, 1879.

Ordinance Book # 1, page 443.

An ordinance to extend gas mains on East Heaton street from 8th street to 11th street in the 3rd ward.

SECTION 1. Be it ordained by the city council of the city of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be authorized to extend their gas mains along East Heaton St. from 8th street to 11th street in the 3rd ward and to erect on said street the usual number of lamp posts.

Passed March 10, 1879.

Ordinance Book # 1, page 455.

An ordinance to extend gas mains and erect the usual number of lamp posts on Front street, 2nd ward from Chestnut street to Beckett street.

SECTION 1. Be it ordained by the city council of the city of Ham-

ilton, Ohio, That the Hamilton Gas-Light and Coke Co. are hereby authorized to extend their gas mains on Front street 2nd ward, from Chestnut street to Beckett street, and to erect the usual number of lamp posts and light the same according to the gas contract existing at this time.

Passed July 21, 1879.

62 Ordinance Book # 1, page 452.

Accepted by Gas Co. July 1, '79.

Resolution ordering the Hamilton Gas-Light and Coke Co. to light 65 lamp posts providing they release old claim for $3,876.94.

Be it resolved by the city council of the city of Hamilton, Ohio, That the Hamilton Gas-Light and Coke Co. are hereby ordered to light the 65 posts that are now erected on the mains and until during the continuance of the present contract.

Providing they will cancel their claim they have against the city amounting to $3,867.94 for 36 posts ordered out November 1875.

Adopted June 30, 1879.

Ordinance Book # 1, page 453.

An ordinance to amend an ordinance entitled an ordinance providing for the laying and extention of gas mains in the 1st ward passed January 13, 1879.

Be it ordained by the city council of the city of Hamilton Ohio That sec. 1 of an ordinance entitled "An ordinance providing for the laying and extention of gas mains in the 1st ward" passed January 13, 1879 be amended so as to read as follows:

SECTION 1. That the Hamilton Gas-Light and Coke Company are hereby authorized to extend and lay their gas mains along
63 Boudinot street from Front street to 5th street and on 5th street from Boudinot street to Main street and along Main street to where said Main street intersects with the Eaton and Millville turnpike and along the Eaton road to Boudinot street.

SECTION 2. That said original section 1 be and is hereby repealed and this ordinance shall be in force from and after its passage.

Passed July 14, 1879.

Ordinance Book # 1, page 497.

An ordinance to extend gas mains and erect 4 lamp posts on Front St. from Buckeye to Vine street, 3rd ward, Hamilton, Ohio.

SECTION 1. Be it ordained by the city council of the city of Hamilton, Ohio That the Hamilton Gas-Light and Coke Company are hereby authorized and derected to extend their gas mains on Front street from Buckeye to Vine streets in the 3rd ward of the city of Hamilton, Ohio.

SECTION 2. That the Hamilton Gas-Light and Coke Co. are hereby authorized and directed to erect 4 lamp posts on said above exten-

sion, one to be located at the alley midway between Buckeye & Heaton Sts., 1 at the corner of Heaton St., 1 at the corner of Vine St., and 1 at the alley midway between Heaton and Vine streets and to light said 4 lamp posts according to their existing gas contract with the city.

Passed January 17, 1881.

64 Ordinance Book # 1, page 497.

An ordinance to extend gas mains along Cincinnati pike from 5th St. to Crawford's run, 4th ward, Hamilton, Ohio, and to erect two lamp posts.

SECTION 1. Be it ordained by the city council of the city of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. are hereby authorized and directed to extend their gas mains along Cincinnati Pike from 5th St. to Crawford's run, in 4th ward, Hamilton, Ohio and to erect 2 lamp posts on said above extention, located as follows:

One on the north side of Cincinnati pike, midway between 5th street and Crawford's run and one near the bridge over Crawford's run on the south side of Cincinnati pike in the 2nd ward and to light said 2 posts according to their existing gas contract with the city.

Passed January 17, 1881.

Ordinance Book # 2, page 194.

Resolution.

Resolved by the city council of the city of Hamilton, Ohio, That the Hamilton Gas-Light and Coke Company be and is hereby instructed to furnish each of the public street lamps with a new 4 foot check gas burner with lava tip and report to this council when they have complied with this resolution.

Adopted Dec. 11, 1883.

65 Ordinance Book # 2, page 196.

Resolution locating and establishing lamp posts.

Be it resolved by the city council of the city of Hamilton, Ohio, That the public gas lamps to light said city be and they are hereby established as follows. All lamps now erected to remain as at present located except the following:

5 to be taken from such place in the 1st ward as may be designated by the grade committee of said ward and located as follows in said ward.

2 lamps to be located on Water street,
1 on 2nd street north of Boudinot street,
1 on 3rd street south of railroad, and
2 new posts on Main street north of 5th and
1 on Ross St. and 1 on 4th St. near Suryer's stable.

In the 2nd ward:

1 lamp to be taken from Water street between Sycamore and Stephen streets, to the corner of Stephen St. and Water streets. 4 to be taken up on south end of Front street and to be located as follows:

1 on Hanover St. between 2nd and 3rd streets,

1 on or near the corner of road leading to Peck's Ave.

The other two to be located as hereinafter determined by the grade committee of said ward and 3 new posts on Hanover street between 2nd and Cincinnati pike, 2 new posts on Washington street between 2nd and Cincinnati pike,

66 1 new post on Washington street between 2nd and Front streets, 1 new post on Walnut street between 2nd and Front streets, 1 new post on Walnut St. between 2d street and Cincinnati pike, 1 on Wood street between Front and 2nd streets and one on Wilson street between 2nd and Front Sts.

In the Third ward changes made as follows:

1 post taken from near the Niles tool works and set at such a point in said ward as the grade committee may select.

1 new post to be placed at the corner of 4th and Vine, 1 on Vine street between 2nd and 3rd streets, 1 on Heaton street between 2nd and 3rd streets,

1 on Heaton between 3rd and 4th streets,

1 on Buckeye between Front and 2nd streets,

1 on Front and Morners alley,

1 at the corner of Front and Heaton Sts. and

1 on the corner of Front and Vine streets.

In the Fourth ward changes shall be made as follows:

Move one post from 4th St. between Wood and Chestnut to Railroad and Chestnut Move one post from the northwest corner of 5th and Sycamore streets to the northwest corner of Sycamore and Railroad,

Two on Canal streets near Ninth, to be extended out near 12th street, one from Talbott's stable to corner of 5th and Caldwell streets. Three new posts to be erected on Cincinnati pike from Fourth street south as follows.

One at Stickel's corner, one at Crawford's run, one two hundred feet south of Crawford's run on Cincinnati pike.

67 In the 5th ward changes shall be made as follows:

One from north side of Heaton St. between 8th and 9th Sts. one from south side of Heaton street between 9th and 10th Sts. one from east side of 7th St. between High and Campbell avenue, one from south side of Heaton between 10th and 11th Sts. and to be located with (36) thirty-six new posts as follows:

1 on the north side of High street between 4th and 5th streets, one on the corner of Center St. one on the corner of 6th St., 1 on the corner of 8th St. 1 on the corner of 9th St. 1 on the corner of 10th St. 1 on the south side of High St. 1 on the corner of 5th and 1 on the corner of 7th streets between 7th and 8th Sts. 1 between 8th and 9th Sts. 1 between 10th and 11th streets, 1 on the east side

of 5th street 1 on the corner of Buc*h*eye street, 2 between Buckeye and Heaton streets, 1 on 6th street west side, 1 on the corner of Butler St. 1 between Dayton and Buckeye streets, 1 between Buckeye and Heaton streets 1 between Vine and Hydraulic Sts. 1 on the east side of 6th, 1 between High and Butler streets 1 between Butler and Dayton Str's. one on the corner of Buckeye St. & 1 between Buckeye and Heaton Sts. and 1 on the corner of Hydraulic Sts. 1 on Schundtman St. on the west side, 1 on the corner of Vine St. and 1 on the corner of Hydraulic St. on the east side. 1 between Heaton and Vine Sts. and 1 between Vine and Hydraulic Sts. on the north side of Dayton, 1 between 8th and 9th Sts. and 1 on the corner of 9th street, — on Shillito street 1 on the north side
68 corner of 8th street and one on the south side between 7th and 8th streets on Greenwood avenue on the north side, one on the corner of 8th street and one on the corner of 9th street, one on the west side of 10th street at the corner of Buckeye street and one on the east side of 10th St. between Heaton and Buckeye streets, one on the west side of 11th street between Heaton and Buckeye and one on the corner of Buckeye street and one on the corner of 8th and Vine Sts.

Adopted Dec. 24, 1883.

Ordinance Book # 2, page 238.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be and are hereby instructed to erect a bracket gas lamp on the corner of Northrup's frame building at the southwest corner of 4th and Basin streets.

Adopted May, 1884.

Ordinance Book # 2, page 254.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Company be instructed to erect three (3) gas posts on North 3rd street, said posts to be erected under the direction of the 3rd-ward grade committee.

Adopted July 8, 1884.

Declared out of order.

Resolution.

Resolved by the city council of Hamilton Ohio That the
68½ Hamilton Gas-Light and Coke Co. be and is hereby instructed to erect two lamp posts on 9th St. 5th ward, one between High street and Campbell avenue and one on the corner of Campbell A*ne*vue and connect the same with proper mains and light them from the time they are erected in conformity with the schedule for lighting adopted by this council. Also one in the First ward at the corner of Main St. and Millville pike; also one on 4th street

between Heaton and Vine on what is known as the Samuel Miller corner, also one on the northwest corner of Sycamore and 4th streets and one on the corner of 8th and Sycamore streets.

Ordinance Book # 2, page 316.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect gas posts at Lawrence Miller's corner on 4th street 3rd ward one between High street and Campbell Ave. one on the corner of Campbell Ave. and 9th street one on Williams street in the centre of the square between 3rd and 4th streets, 4th ward, one on Hanover St. two on Washington and on Walnut streets Second ward.

Adopted April 7, 1885.

Ordinance Book # 2, page 318.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. is hereby requested to erect 3 69 gas posts on 2nd street north of Mill street said lamp post to be placed as the grade committee may direct, also one post on Wood street between 4th and 5th streets, also to make the redistribution of gas posts as agreed to with the city council when said company entered into contract with the city.

Adopted April 7, 1885.

Ordinance Book # 2, page 333.

Resolution.

Resolved by the city council of Hamilton Ohio, That the gas company be instructed to erect one gas post on corner of Millikin and 3rd Sts. 1st ward.

Adopted June 2, 1885.

Ordinance Book # 2, page 421.

Resolution.

Resolved by the city council of Hamilton, Ohio That a lamp post be erected in the south side of 4th St. between Chestnut and Wood Sts. on the corner of the alley.

Adopted Aug. 3, 1886.

Ordinance Book # 2, page 422.

Resolution.

Resolved by the city council of Hamilton, Ohio That the Hamilton Gas-Light and Coke Co. be and are hereby instructed to erect a gas post at the intersection of Vine and 5th Sts. 5th ward.

Adopted Aug. 3, 1886.

70 Ordinance Book # 2, page 442.

Resolution.

Resolved by the city council of Hamilton Ohio That a gas lamp be erected on the south side of 4th street between Chestnut and Wood streets on the corner of the alley.
Adopted Aug. 3, 1886.

Ordinance Book # 2, page 422.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. be and are hereby instructed to erect a gas post at the intersection of Vine and 5th Sts. 5th ward.
Adopted Aug. 3, 1886.

Ordinance Book # 2, page 423.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect a gas post in the corner of 3rd and North streets.
Adopted Aug. 3, 1886.

Ordinance Book # 2, page 424.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to place a lamp post on Walnut street between 4th and 5th Sts. 4th ward.
Adopted Aug. 3, 1886.

71 Ordinance Book # 2, page 430.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. be and is hereby instructed to erect one gas post at the corner of South Ave. and Cincinnati pike and one midway between South Ave. and Crawford run on the Cincinnati pike.
Adopted Sept. 7, 1886.

Ordinance Book # 2, page 437.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect a lamp post on 3rd street between Boudinot and North Sts.
Adopted Sept. 21, 1886.

Ordinance Book # 2, page 453.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect a lamp post on Second and Millikin Sts. 1st ward.
Adopted Oct. 5, 1886.

Ordinance Book # 2, page 466.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. be and are hereby instructed to erect a gas post on Sycamore St. between Front and 2nd. Also
72 between 2nd and 3rd, same street, also on Front between Wood and Chestnut streets.
Adopted Dec. 15, 1886.

Ordinance Book # 2, page 467.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect a lamp post and light the same on the corner of 5th and Canal Sts. 4th ward.
Adopted Dec. 15, 1886.

Ordinance Book # 2, page 489.

Resolution.

Resolved by the city council of Hamilton Ohio, That the Hamilton Gas-Light and Coke Co. be and are hereby instructed to erect a lamp post at the corner of Washington St. and Cincinnati pike and one midway between Washington St. and Hanover St. on the east side of Cincinnati pike.
Adopted May 3, 1887.

Ordinance Book # 2, page 500.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be and is hereby instructed to lay pipe and erect lamp post on Chestnut St. between 2nd and Front Sts. at a point about midway of the square on the north side.
Adopted May 17, 1887.

73 Ordinance Book # 2, page 541.

Resolution.

Resolved by the city council of Hamilton Ohio That the city clerk be and is hereby instructed to notify the Hamilton Gas-Light

and Coke Co. to lay mains and to erect a lamp post at the northwest corner of lot # 327 on Pleasant View alley.
Adopted Sept. 6, 1887.

Ordinance Book # 2, page 562.

Resolution.

Resolved by the city council of Hamilton Ohio That the city clerk is hereby instructed to notify the Hamilton Gas-Light and Coke Co. to extend mains to the southeast corner of Lane and Minister Sts. and to the northeast corner of Lane and Owen Sts.
Adopted Dec. 6, 1887.

Ordinance Book # 2, page 566.

Resolution.

Resolved by the city council of Hamilton Ohio That the Hamilton Gas-Light and Coke Co. be instructed to erect a gas post on Chestnut St. between Fourth and Fifth Sts.
Adopted Dec. 20, 1887.

74 & 75 Ordinance Book # 3, page 8.

Resolution.

Resolved by the city council of Hamilton, Ohio, That the Hamilton Gas-Light and Coke Co. be and is hereby notified to light 10 gas lamps in the 4th Ward park at a cost not to exceed six dollars per month the same to be lit three hours each evening beginning June 9, 1888 and ending October 31, 1888.
Adopted June 7, 1888.

And afterwards, to wit, on the 11th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of defendant, clothed in the words and figures following, to wit:

Affidavit of A. J. Welliver & Exhibits.

76 In the Circuit Court of the United States, Southern District of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE CO, a Corporation, Complainant,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, Defendant.

Affidavit of A. J. Welliver, clerk of common pleas court of Butler county, Ohio.

A. J. Welliver, being first duly sworn, says that he is the duly elected, qualified, and acting clerk of court for Butler county, in the State of Ohio.

That the complainant in the above cause began action in said common pleas court in and for Butler county, Ohio, against the said defendant above, The City of Hamilton, by filing a petition on the 29th day of Dec., 1888, a true copy of which is hereto attached, marked "A," and that said suit was pending at the time and after the 7th day of January, 1889.

A. J. WELLIVER.

Sworn to before me and subscribed in my presence this 11th day of January, A. D. 1889.

JNO. F. HEATH,
Deputy Clerk of Common Pleas Court of Butler Co., Ohio. [SEAL.]

77 State of Ohio, Butler County, Court of Common Pleas.

THE HAMILTON GAS-LIGHT AND COKE CO., a Corporation, Plaintiff,
vs.
THE CITY OF HAMILTON, Butler County, State of Ohio, Defendant.

Petition.

The Hamilton Gas-Light and Coke Co., plaintiff above named, says it is a corporation duly incorporated and organized under the laws of the State of Ohio and having its place of business and office in said City of Hamilton, defendant above named. It says that said city of Hamilton is a municipal corporation organized according to the laws of Ohio and has, by the last Federal census, a population of 12,122.

Plaintiff says it was incorporated and organized for the purpose of manufacturing and supplying gas to light the streets, alleys, and public grounds and buildings of said city of Hamilton and to supply gas for the lighting of private buildings and residences of its citizens and for general public and private consumption within said city, according to the laws of the State of Ohio in such case made and provided, and it went into active operation in said city for that purpose in 1855, and has been continuously ever since said date and is at present engaged in said business.

It says that on the 9th day of June, 1855, the council of said city duly passed an ordinance whereby plaintiff was granted the
78 right to use and occupy the streets, lanes, alleys, and public grounds of said city for the purpose of laying down its pipes and mains for the purposes aforesaid, and in accordance with its charter, the laws of the State, and the ordinances and resolutions of said city council it has expended large sums of money in erecting, building, and furnishing and equipping them with the necessary machinery and appliances for the manufacture of gas and in procuring and laying down in said streets, &c., pipes and mains for the distribution and delivery of said gas and making all the necessary connection with gas posts within said city, as requested and required

by said defendant, to supply said public and private consumption and to accommodate said city and its citizens aforesaid, and it has at all times since going into operation in said city fully complied with all the provisions of the laws of the State of Ohio governing gas companies and all the ordinances and resolutions of the said city council, and has fully kept and observed all the duties and liabilities imposed by its charter & by said laws, ordinances, & resolutions as aforesaid, & its charter has never been dissolved or impaired in any respect by any court or authority whatever and is now in full force.

Plaintiff says that said city through its council has repeatedly from time to time during the last thirty years by ordinance fixed the price which plaintiff should charge for its gas furnished for the public and private lighting, as provided by section 2478, Revised Statutes of Ohio, and by authority of other laws of the State in force prior thereto, & has appointed an inspector of —, as provided
79 for by sec. 2484, Rev. Stat., & other laws of Ohio passed for such purposes by the *l*agislature of the State for the government of gas companies, and on the 1st day of July, 1858, by authority of said laws and statutes, required plaintiff to lay its mains on 4th street and erect lamps and posts thereon, and on the 30th day of Aug., 1858, required plaintiff to lay its mains on 1st street from Basin to Sycamore Sts., and on Nov. 15, 1860, required plaintiff to lay its mains on Ross and 3rd streets, in the First ward of said city, and on 2nd street, Third ward, and on Henry St., Second ward, and erect thereon and connect therewith lamp posts "according to the general plan adopted throughout the city" by said council, and on March 2nd, 1863, ordered plaintiff to lay mains along 3rd street between Buckeye and Vine streets, 3rd ward, and on same street between Ludlow and Sycamore Sts., 2*b*d ward, and at the inters-ection of 2nd and Heaton Sts., 3rd ward, and erect thereon and connect therewith lamp posts, and on Oct. 11, 1864, required plaintiff to lay its mains on 2nd street, 1st ward, from Ross St. to 1st-ward fire-engine house and erect thereon and connect therewith a lamp post, and on June 12, 1865, required plaintiff to lay its mains in 3rd, Dayton, and Front Sts., 3rd ward, on Basin St. between 2nd and 3rd streets, and in 3rd and Ludlow streets, 2nd ward; and on July 6, 1867, by a general ordinance duly passed by said council entitled "An ordinance to extend gas-lights in the city of Hamilton," plaintiff was ordered and required to extend its mains on Front St., 1st ward, commencing at their terminus, south of Ross Sts., and extending southwardly to the south side of South street, and
80 erect thereon and connect five lamp posts therewith, and extend its mains on Front street, 2nd ward, to Chestnut street and erect eight lamp posts thereo*f*, and extend its mains on 2nd street to Washington street, 2nd ward, and erect 13 lamp posts thereon and on 3rd street to Cincinnati pike and erect 5 additional lamp posts thereon, on Fourth street to Walnut street and erect five additional lamp posts thereon, on 5th St. to Cin'ti pike & erect 7 lamp posts thereon, on Second street to Mill street, 3rd ward, and

erect 5 lamp posts thereon, on Main street, 1st ward, and erect 6 lamp posts thereon.

And on May 12, 1868, said council ordered and required plaintiff to lay the necessary mains and pipes and erect six lamps on the suspension bridge spanning the Great Miami river, which flows through said city and divides said city into two parts.

And on November 30, 1869, said council required plaintiff "to continue and extend its mains from Third street and Fourth street on Canal street, 2nd ward, and erect one lamp post between said streets" under the direction and control of the committee on gas of the city council of said city; and on November 15, 1870, plaintiff was required by said council to extend its mains on Ludlow street from 1st to Water street, thence north to Basin St., in 2nd ward, also along Dayton from 5th to 8th streets, 3rd ward, on the same terms that mains are extended and lamp posts erected in other parts of the city; on October 31, 1871, said city council duly passed an ordinance requiring plaintiff to lay mains and erect lamp posts thereon on Canal street from 4th to 9th streets, on Ludlow streets from 4th to 10th streets, and on Sycamore street from 5th to
81 7th streets, 4th ward, and on High street eastwardly from plaintiff's gas works to 7th street and northwardly on 7th to Heaton street, 3rd ward, and to erect 14 lamp posts thereon, said 3rd-ward extension, "in accordance with the resolution of board of improvements," which board was then composed of certain officers and agents of said city and members of its said council before that time appointed by said council.

On Oct. 1st, 1872, said council required plaintiff to lay its mains and erect thereon lamp posts on Water street, 3rd ward, "such improvement being recommended by the board of improvements."

On October 15, 1872, said council required plaintiff to extend its mains on Third street from north line of "Niles tool works" premises to the north line of Cope and Maxwell Manufacturing Co.'s premises and erect lamp posts on said space at the usual intervals, under the direction of the committee on gas, said committee being composed of members of said council.

On April 28, 1873, said council, by ordinance duly passed, required plaintiff to extend its mains on 5th street between High and Dayton Sts., 3rd ward, and erect three lamp posts thereon and furnish lamps and all necessary fixtures therefor.

On April 28, 1873, said council requested and required plaintiff to extend its mains on Ross St. between 4th and 6th streets, 1st ward, and erect 5 lamp posts "and furnish all necessary fixtures for each of said posts."

82 On June 9, 1873, council required plaintiff to extend its mains on 4th street, Boudinot and North Sts., 1st ward, erect 3 lamp posts thereon, "and furnish a lamp and all necessary fixtures for each post."

On January 5, 1874, council required plaintiffs to extend its mains on Water St., 2nd ward, and erect four gas posts thereon. On March 23, 1874, required plaintiff to lay its mains and erect the necessary lamp posts on Seventh street from Canal to Sycamore St.,

from 7th to 8th streets, and southwardly thereon to the 4th-ward school-house. On December 30, 1878, required plaintiff to extend its mains on Washington St. from 2nd St. to Cincinnati pike, 2nd ward, and erect one lamp post on said Washington St. On Dec. 30, 1878, required plaintiff to extend its mains on 4th street from Boudinot street to a point opposite Clark & Co.'s saw-mill, 1st ward, and erect gas posts thereon. On Jan'y 13, 1879, required plaintiff to extend its mains on Boudinot St. from Front to 5th streets and on 5th to Main, along Main to its intersection with the Eaton pike, and along said pike to Boudinot St. and erect the usual number of lamp posts along said route. On March 10, 1879, required plaintiff to extend its mains on East Heaton street from 8th to 11th streets, 3rd ward, and erect the usual number of lamp posts thereon.

On July 21, 1879, required plaintiff to extend its mains on Front streets, 2nd ward, from Chestnut to Beckett streets and erect the usual number of lamp posts thereon. On June 30, 1879, said council required plaintiff to light sixty-five posts erected by its orders on mains of plaintiff and to continue lighting the same during the continuance of the contract then in force between said parties,
83 on condition that plaintiff cancel its claim of $3,867.94 which it then held against defendant for thirty-six lamp posts ordered out by defendant's council and not lit since November, 1875, which order and condition plaintiff performed and accepted.

On January 17, 1881, said council required plaintiff to extend its mains on Front street from Buckeye to Vine street, 3rd ward, and erect 4 lamp posts thereon, and on Cincinnati pike from 5th street to Crawford's run, 4th ward, and erect two lamp posts thereon.

And on December 11, 1883, required plaintiff to furnish each of the public street lamps with a new four-foot check gas burner with lava tip, which order plaintiff obeyed, and on December 24, 1883, required plaintiff to change the location of a great many of said lamp posts, taking them from their location where previously placed by order of said council and place them at other locations, make all the necessary connections and lay all the additional mains and pipes required at plaintiff's own cost, which order plaintiff obeyed.

And on May —, 1884, required plaintiff to erect a bracket gas lamp on corner of Northrup's frame building, at southwest corner of 4th and Basin Sts., 4th ward, and on July 8, 1884, required plaintiff to lay mains on North 3d street and erect lamp posts, and on April 7, 1885, required plaintiff to lay its mains and erect lamp posts at corner of 4th and Heaton streets, 3rd ward, and between High street and Campbell Ave. and on the corner of Campbell Ave. and 9th street and on William street between
84 3rd and 4th streets, 4th ward, and on Hanover, Washington, and Walnut streets, 2nd ward, and to erect three gas posts on 2nd street, north of Mill street, where directed by the grade committee of said ward, which committee was composed of members of said council; also one post on Wood street between 4th and 5th streets, and on June 2, 1885, required plaintiff to erect one gas post

on corner of Millikin and 3rd streets, 1st ward, and on Aug. 3, 1886, required plaintiff — a lamp post on 4th street between Chestnut and Wood streets, 4th ward, and one at the corner of Vine and 5th —, Fifth ward, and one on the corner of 3rd and North streets and one on Walnut street between 4th and 5th streets, 4th ward, and on September 7, 1886, required plaintiff to erect a gas post at a corner of South avenue and Cincinnati pike and one on Cincinnati pike midway between South Ave. and Crawford's run, and on September 21, 1886, required plaintiff to erect a lamp post on 3rd street between Boudinot and North streets, and on October 5, 1886, required plaintiff *required plaintiff* to erect a lamp post on 2nd street and on Milikin street, 1st ward, and on Dec. 15, 1886, required plaintiff to erect a gas post on Sycamore streets between Front & 2nd St. & 1 between 2nd & 3rd Sts., & also on Front street between Wood and Chestnut street- and on the corner of 5th and Canal Sts., 4th ward, and on May 3, 1887, reauired plaintiff to erect lamp post at corner of Washington street and Cincinnati pike and one midway between Washington street and Hanover street on Cincinnati pike,

85 and on May 17, 1887, required plaintiff to lay its mains and erect gas post on Chestnut street between 2nd and Front streets; on Sept. 6, 1887, required plaintiff to lay mains and erect a gas post at the northwest corner of lot number 327, on Pleasant View alley; on December 6, 1887, required plaintiff to extend its mains to southeast corner of Lane & Minister St. & to the N. E. corner of Lane and Owens streets; on December 20, 1887, required plaintiff to erect a gas post on Chestnut street between Fourth and 5th streets; on June 7, 1888, required plaintiff to light ten gas lamps in the 4th Ward park, all which streets and alleys and other named places are within said city of Hamilton.

Plaintiff says that by the provisions of said ordinance passed by said council July 9, 1855, providing for the organization of plaintiff and its use of the streets, lanes, alleys, and public grounds of said city said council reserved the right to approve the location of said works if constructed within said city, which power it exercised, and said works were located within said city and at their present location with the consent and approbation of said council.

And on the 9th day of July, 1855, said council duly passed an ordinance wherein it was declared that said gas works were a public necessity for said city and its inhabitants and were highly beneficial for said city and its inhabitants, and to aid in the successful accomplishment of said gas works for said purposes and to encourage the taking of the stock said council declared in said ordinance that it would take the capital stock of said company and become a share-

86 holder therein to the amount of one hundred shares thereof, the par value of which shares was fifty dollars each, and it paid into the treasury of said company five thousand dollars due upon said stock, and in said ordinance it was provided that said city council, for and on behalf of said city, as a stockholder in said company, should have the right and privilege at all times to appoint one of its own number to vote at all meetings of said company, according to the number of shares of stock owned by said city,

which ordinance went into full force and effect, and said city exercised all the powers and assumed all the obligations of a stockholder in said company, as set out in said ordinance, so long as it owned any of said stock and received all the benefits and advantages derived therefrom.

Plaintiff says that, relying upon said ordinance and upon the law of the State of Ohio and the vested rights thus acquired, it has made all the improvements herein set forth and laid its mains and erected lamp posts and furnished the gas at all times at the price fixed by said council, whereby it has incurred great expense of time and money.

Plaintiff says it has erected on its mains five hundred and thirty-two lamp posts by orders of said defend*nat*'s council, and there are at present lighted and *has* been for a long time five hundred and nine of said public lamps and there are at present in use in connection with its said works about thirty miles of gas mains and pipes, all laid in the streets, alleys, and public grounds of said city by order of said council and upon the faith and authority of said ordinances aforesaid, which mains extend into and through almost
87 every street in said city from its *its* center to its extreme corporate limits in every direction, which corporate limits include about three and one-half square miles of territory, and a great portion of said mains in different parts of said city are used exclusively for the purpose of conveying gas to the public streets and lamps and to light the public grounds, there being no private consumers of gas and in many places no habitations or buildings of any kinds along the line of said gas mains.

Plaintiff says it has made all the necessary connections to lamp posts, made all changes whenever required by said council at its own expense, and has fully performed all the duties imposed by its charter, the laws of the State, and the orders of said council when duly notified by authority thereof; and it avers that it is now and has at all times been ready, able, and willing to do and perform all said duties as required of a gas Co. according to the laws of Ohio.

Plaintiff says it has expended large sums of money in erecting its said works and in laying down and making the proper connection with its gas mains for the manufacture and delivery of gas for the public and private consumption aforesaid; that said buildings, machinery, fixtures, and other appliances for the manufacture of gas and said pipes for its distribution cannot be used for any other purpose or be put to any other use and will be wholly lost to plaintiff unless used for these purposes herein described and for which they were built and laid.

Plaintiff says that defendant, through its said council, in
88 1883, passed an ordinance entitled "An ordinance to *to* regulate the price which the Hamilton Gas-Light and Coke Company may charge and receive for gas furnished by it to the city of Hamilton, Ohio, and to the citizens thereof for and during a period of 5 y'rs from and after January 1, 1884," to the terms and conditions of which plaintiff assented by its written acceptance filed in the office of the clerk of defendant, and which ordinance is now in full force,

has never been amended or repealed, and went into effect January 1, 1884.

On September 4, 1888, said city, by its council, passed an ordinance to submit to the qualified voters of said city the question of issuing $150,000.00 of the bonds of said city for the purpose of erecting gas works, to be owned and operated by said city, and ordered the mayor of said city to issue his proclamation to the qualified voters thereof to vote upon said proposition to issue said bonds at the regular election to be held on the 6 day of Nov., 1888, and in pursuance of said ordinance and proclamation there were polled 2,412 votes for and 59 votes against the issue of said bonds, and at said election there were cast 3,882 votes in said city for State and county officers.

In pursuance of said votes said council, on the 18th day of December, 1888, passed an ordinance to issue said sum of $150,000.00 of its bonds for the purpose of erecting gas works within said city for the manufacturing of gas to supply the public and private consumption thereof within said city and to lay mains and pipes in all the streets, lanes, alleys, public grounds and buildings
89 thereof, to parallel the pipes *pipes* and mains of plaintiff, to deprive it of all the public lighting, and to compete with it for the private consumption of gas in said city.

And to pay said bonds and interest accruing thereon said council proposes and intends to levy a tax upon all the taxa-le property within said city, including all the property of plaintiff in addition to the amount otherwise allowed by law, sufficient each year to pay the amount of the principal and interest of said bonds as the same shall come due until they are all paid, which bonds are to be due and payable in not less than ten nor more than thirty years from the date of their issue, which is Feb. 1, 1889, and these bonds and additional taxation said council proposes to issue and levy respectively by authority of sections 2835, 2836, and 2837, Revised Statutes of Ohio, and by no other authority whatever.

Plaintiff denies the right of defendant or that it has any power under the laws of Ohio to erect or operate gas works or engage in the business of manufacturing gas for either public or private consumption, and it denies the right of defendant to issue bonds for any such purpose or to levy tax to pay such bonds or to levy any tax in excess of the amount otherwise allowed by law, and it says that defendant ought to be forever enjoined and restrained from doing any of the acts herein set out for the following reasons:

First. Said proposed gas works and their operation by defendant is not such a local improvement as is comtemplated or intended by said section 2835.

90 Second. Because said proposed gas works and their operation by defendant in opposition to the gas works of plaintiff is a violation of article 11, section XXVIII, Constitution of Ohio, and of article 1, section X, of the Constitution of the United States.

Third. Because said proposed gas works and their operation by defendant in opposition to the gas works of plaintiff will work a complete destruction of plaintiff's said works and business and all

vested rights and property acquired by its charter, and is a taking of plaintiff's property for a public use without making any compensation therefor, and is depriving plaintiff of its property without due process of law, and is a violation of the constitution of the State of Ohio and the Constitution of the United States.

Fourth. Because said proposed gas works and their operation by defendant in opposition to the gas works of plaintiff will destroy plaintiff's franchise and vested rights and property acquired by it upon the faith and credit thereof "without due process of law," and is a violation of the XIV amendment to the Constitution of the United States.

Fifth. Because the proposition to issue said bonds and levy said additional tax did not receive the requisite number of votes as provided by said section 2837, Revised Statutes of Ohio.

Wherefore plaintiff prays the court for a temporary order enjoining defendant, through its said council or otherwise, from issuing any bonds for the purpose of erecting said proposed gas works
91 or from operating any such works or engaging in the business of manufacturing gas for any purpose whatever and to restrain said defendant from levying any additional taxes to pay any such bonds or interest thereon, and on final hearing that said restraining order may be made perpetual; and it prays for all other relief in the premises.

By MILLIKIN, HUME, FOLLETT & NEILAN,
Attorneys for Plaintiff.

STATE OF OHIO, }
Butler County, } *ss:*

Daniel H. Hensley, being duly sworn according to law, deposes and says that he is the secretary and business manager of plaintiff, duly authorized in the premises, and that all the averments contained in the foregoing petition are true.

(Signed) D. H. HENSLEY.

Signed and sworn to before me this 28th day of December, 1888.
CHAS. S. HAINES,
Notary Public, Butler County, Ohio.

State of Ohio, Butler County, Court of Common Pleas.

THE HAMILTON GAS-LIGHT AND COKE CO., Plaintiff,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, a Municipal Corporation, Defendant.

To the clerk of said court:

Issue summons to the sheriff of said county for the said
92 above-named defendant, returnable according to law.

Indorse summons "Prayer for equitable relief."

MILIKIN, HUME, FOLLETT & NEILAN,
Attorneys for Plaintiff.

STATE OF OHIO, }
Butler County, Ohio, } ss:

I, A. J. Welliver, clerk of common pleas court of State and county above named, do hereby certify the foregoing to be a true and correct copy of the petition filed in the above-entitled cause.

In witness whereof I have hereunto set my hand & seal of said court, at Hamilton, this 11th day of January, A. D. 1889.

A. J. WELLIVER, *Clerk.* [SEAL.]

93 And afterwards, to wit, on the 11th day of January, A. D. 1889, the following affidavit and exhibits *was* filed in the clerk's office of said court on behalf of defendant, clothed in the words and figures following, to wit:

Affidavit, &c.

In the Circuit Court of the United States, Southern district of Ohio, Western Division.

STATE OF OHIO, }
Butler County, } ss:

Affidavit.

J. J. McMaken, being duly sworn says:

That he is the clerk of the city of Hamilton, Ohio.

That the exhibits hereto attached, marked A, B, C, D, E, F, G, H, I, J, K, L, M, are correct copies of the original papers and records in his custody as said clerk.

That the city council had purchased gasoline lamps for the purpose of lighting the streets and public places of Hamilton before application had been made to the U. S. circuit court for an injunction or restraining order in this case, and that said city council was about to have said lamps put up for the purpose of lighting said streets and public places when they were served with notice of the restraining order granted in this case.

That the streets, alleys, and public places in said city have been in darkness since the night of January 1st, 1889, except that the city council have procured lamps and caused the same to be used where necessary in the public buildings in said city.

94 That the vote cast by the qualified voters of said city for the issue of the bonds mentioned in the ordinance attached to plaintiff's affidavits was so cast under an ordinance duly passed by the city council of said city.

That whenever said gas Co. erected gas posts in said city, with authority or under the direction of the authorities of said city, the said gas Co. presented its bills for the same to said city, and which bills were duly allowed and paid.

J. J. McMAKEN.

Signed in my presence and sworn to before me this 11th day of January, 1889.

GONVERNEUR C. MOREY,
Notary Public, Butler Co., Ohio. [SEAL.]

EXHIBIT A.

COUNCIL CHAMBER, THURSDAY EVE., *April* 10, 1862.

Minute Book # 1, pages 631, '2, & '3.

This article of agreement, made on this 30th day of January, A. D. 1882, be and between E. Gwyn and A. C. Campbell, lessees of the Hamilton Gas-Light and Coke Co. of the city of Hamilton, of the first part, and said city of Hamilton, of the second part, witnesseth:

That the said parties of the first part, in consideration of the covenants of the said city of Hamilton, the party of the second
95 part hereinafter mentioned, agree to furnish gas for the one hundred and eight (108) public lanterns in said city of Hamilton now in use for the purpose of lighting the streets of said city from the 1st day of February, A. D. 1862, until the 1st day of September, A. D. 1865, said gas to be of a good quality. The burners in each of said lanterns are to be such as shall consume not less than six cubic feet of gas per hour when the same are lighted. Said parties of the first part also agree to paint all of said lanterns and the costs connected therewith once a year during the existence of this contract, and to clean said lanterns once per month.

Said painting and cleaning to be done regularly; also to keep said lanterns and posts in as good order as they are now in, ordinary wear and tear excepted. It is further agreed that in case any of the burners get out of order or any part connected with the public lighting becoming deranged the parties of the 1st part shall, within two days after notification, be under obligation to attend to and correct the same. It is, however, the understanding of the parties to this contract that when any of said lanterns are broken or when anything connected therewith is in need of repair said repairs are to be done at the expense of the said parties of the first part, the said city of Hamilton paying for the glass and other materials necessary to be used in making said repairs. It is further agreed that said parties of the 1st part shall, at their expense, cause said lanterns to be lighted and the lights therein extinguished, the manner and time regulating the lighting and extinguishing to be deter-
96 mined by the condition of the moon, as *as* has heretofore been the usage.

In the absence of the moon the said lights are to be extinguished between fifteen minutes after one o'clock a. m. and fifteen minutes before three o'clock a. m., said lighting and extinguishing to be done regularly.

In consideration of the above covenants of the said parties of the 1st part the said city of Hamilton agrees to pay to the said parties of the 1st part at the rate of thirty-five dollars ($35.00) per annum during the existance of this contract for each of said lanterns, said payments to be made in monthly installments, to be paid in the bonds of the said city, bearing six per centum interest from date, said bonds to be drawn under the ordinance for paying the current expenses of the city or in cash if there is a sufficient amount of cash

in the city treasury that in the opinion of the city council can be appropriated for that purpose. It is further agreed that any and all additional public lanterns that the city council of said city may determine upon erecting within the time limited by this contract or any of the public lanterns which may at the present time be erected and not used shall, if required by said city of Hamilton, be supplied with gas by said parties of the 1st part in the same manner and upon the terms and conditions as herein specified.

In testimony whereof the said E. Gwyn and A. C. Campbell, the parties of the 1st part, and the members of the city council of the city of Hamilton, the party of the second part, have hereto affixed their hands and seals on the day and year first above written; the said city of Hamilton also, by its city clerk, hereto affixes its corporate seal.

97

Attest: (Sig.) W. H. ROBERTS,
City Clerk, Hamilton, Ohio.

"EXHIBIT B."

Minute Book # 2, page 107.

COUNCIL CHAMBER, MONDAY EVE., *Nov.* 13, 1865.

At a meeting of council held on the above date the following entry appears:

"The gas company's proposition to renew the old contract for ten years, or light public lamps according to Cincinnati Gas Co.'s time table, at $50.00 per post, was referred to gas committee."

98

"C."

Article of agreement made and concluded by and between E. Gwyn and Abner C. Campbell, lessees of the Hamilton Gas-Light and Coke Co., of the city of Hamilton, Butler county, Ohio, operating under the name of the Hamilton Gas Co., of the 1st part, and the said City of Hamilton, of the 2nd part, witnesseth:

That the said party of the 1st part, for and in consideration of the covenants of the said city of Hamilton entered into upon the part of the said city, through and by the city council, and which covenants are hereinafter mentioned, agree and bind themselves by these presents to furnish gas to the said city of Hamilton for the lighting in the night season of all the public or street lamps that are now erected within said city, numbering one hundred and thirty-four or more, as the case may be, and in like manner for all such additional lamps as may be hereafter erected within said city of Hamilton, under the direction and by authority of the said city council, the purposes and object being the lighting of the streets of said city by means of said gas so to be furnished — aforesaid. The said gas so to be furnished by the said party of the 1st part shall at all times be of good quality and in every way suitable and fitting for the purposes for which it is intended, which gas, in sufficient quantity for the purposes aforesaid, the said party of the first part

agree and bind themselves to furnish for the full and entire
99 term of 5 years, commencing on the first day of June, in the year of our Lord one thousand eight hundred and sixty-six, and ending on the 31st day of May, A. D. eighteen hundred and seventy-one, and the burners provided for or to be provided for each of the lanterns shall be what is known as four-feet burners, such as will consume four cubic feet of gas per hour when the same are burning. Said party of the 1st part also agree and bind themselves to furnish the paint and to paint the posts with coal-tar once each year during the existance of this contract, and also to clean said lanterns once every month until the expiration of this contract; said painting and cleaning to be punctually attended to and the work faithfully executed; also to keep said lanterns and posts in as good order as they now are in, wear and tear excepted. The party of the first part further agree that when any of said burners get out of order, or any post connected with said lanterns becomes deranged or out of order, that they will, within two days after being notified by order of the city council, faithfully attend to it and correct and adjust the same. It is to be understood, however, by and between the parties to this contract that when any of said lanterns are broken and when anything therewith connected is in need of repair said repairs are to be made at the expense of said parties of the second part. The said party of the second part shall pay for the glass, as also for such other materials as may be necessary in the making and completing of said repairs, together with the work thereon.

100 The said party of the first part further agree and bind themselves to cause said lanterns to be lighted and the lights thereof to be extinguished at their own cost and expense, the same to be lighted and kept burning during the night, following the moon as follows:

When there is no moon to give light the said lanterns shall be lighted, commencing to light the same within one-half hour after sunset, and the said lights shall be extinguished about one hour before sunrise in the morning.

And at such time when the moon is giving light the lanterns shall be lighted, as near as may be, one hour before the moon sets or disappears in the west, and may be extinguished at any time after the lapse of one half hour after the rising of the moon in the night season, said lighting and extinguishing of said lanterns to be regularly, punctually, and faithfully attended to by the said Hamilton Gas Co., party of the 1st part, and at their cost and expense.

And should said party of the 1st part at any time fail to furnish gas of a good quality to supply said lanterns or any one or more of them, or should at any time fail to light said lamps or any one or more of them, in pursuance *to* the terms of this contract, then and in that case there shall be made a deduction from the gas bills or rents in proportion to the time said parties of the first part shall so fail to furnish gas and in proportion to the number of the posts or lanterns which may not be thus supplied or lighted in pursuance of the terms of this contract.

101 In pursuance of the above covenants of the said parties of the 1st part and their compliance *of* the same in good faith, the said city of Hamilton, through and by her city council, agrees that there shall be paid to the said parties of the first part at the rate of thirty dollars per annum during the exist-nce of this contract for each of said public lanterns now established or which may be hereafter established under the authority of the city council and so *m*ighted by the parties of the first part in pursuance of the terms of this contract.

Said payment- to be made in monthly installments, in orders upon the city treasury when there are funds in said treasury; — then and in that case payments shall be made in the bonds of the said city, bearing interest at the rate of six per centum per annum from the date of said bonds, to be drawn under the ordinance for the payment of the current expenses of the city of Hamilton.

HAMILTON GAS CO.,
By A. C. CAMPBELL,
Superintendent.

JACOB TROUTMAN,
JOHN M. LONG,
PETER HUMBACH,
JOSEPH TRABER,
THOS. CONAUGHTON,
Members of Council.

Attest: W. C. ROBERTS, *City Clerk.*

June 6, 1886.

102 "D"

(*Contract of June* 3, 1868.)

An ordinance to fix the price at which the city of Hamilton may require the Hamilton Gas-Light and Coke Co. to furnish gas for the use of said city and other consumers.

Gas furnished at four dollars per 1,000 cubic feet.

SECTION 1. Be it ordained by the city council of the city of Hamilton, That for, and during the period of 10 years from and after the passage of this ordinance and the written acceptance thereof, by the Hamilton Gas-Light and Coke Co. the price at which the city of Hamilton shall require the Hamilton Gas-Light and Coke Co. to furnish gas to said city of Hamilton for lighting streets, public buildings or any other purpose and to other consumers in said city, shall be fixed at four dollars per thousand cubic feet provided that nothing herein contained shall in any way affect any existing contract between said city of Hamilton and said Hamilton Gas-Light and Coke Co., in reference to furnishing gas to said city to light the streets &c. in said city.

Good and merchantable gas to be furnished.

SECTION 2. That in consideration of the right and privilege granted to the Hamilton Gas-Light and Coke Co. in the first section of this ordinance mentioned, the said Hamilton Gas-Light and Coke
103 Co. shall and they are hereby required during and throughout the said period of 10 years mentioned in the first section of this ordinance to furnish gas, as well for public city purposes as to the citizens of said city of Hamilton, using said gas of good and merchantable quality and no other.

And for the purpose and certainty of supplying the quality required for public and private use, as aforesaid to the city of Hamilton and the citizens thereof, using the same, the Hamilton Gas-Light and Coke Co. shall at their own cost and expense forthwith commence to extend and enlarge their gas works, apparatus and machinery and within a reasonable time complete the same, and from time to time hereafter make such additional extensions and enlargements thereof, as may be necessary so as at all times, to supply the demand for merchantable gas. Said company shall also without unreasonable delay erect lamp posts lay the necessary pipes and extend the gas lights as heretofore ordered by ordinance or resolution of the city council, and said company shall receive the same price per post for lighting, extinguishing &c. as is now paid for other posts under the contract now existing between said gas company and the city of Hamilton until said contract expires by the limitation therein mentioned.

The company to supply additional lamp posts when needed.

SECTION 3. Whenever said city council of said city of Hamilton shall, by ordinance or resolution order the erection of addi-
104 tional lamp posts and lamps for lighting the streets squares alleys and public grounds of said city the said company shall supply such additional posts and lamps and shall light them with gas, under the same terms and at the same rates as for lighting and extinguishing said lights &c., under the contract mentioned in section second of this ordinance during the continuance of said contract, provided that nothing in this section, however, shall be construed to make it obligatory upon said company to extend the lamp posts and lamps hereafter to be ordered by said city council, or to extend their main or supply pipes for the lighting of such posts and lamps hereafter ordered, within the period of ten years by said city council, nor to compel said company to light said additional posts as aforesaid, hereafter ordered by said city council, unless there shall be along the line, or lines of such extension, other demands for gas, which shall in connection with the public lamps yield said company at the rate of eight per cent. per annum upon the gross costs of such extension of pipes.

SECTION 4. That this ordinance shall be in force and take effect from the time when the Hamilton Gas-Light and Coke Co. shall make known to the city council, by resolution, or by some other

proper method of its acceptance of the terms, provisions & conditions of the same and not before.

105 SECTION 5. That should the foregoing ordinance be accepted by said Hamilton Gas-Light and Coke Co., then and in that case, the ordinance entitled "An ordinance to fix the maximum price of gas," passed February 26, 1867 shall be and the same is hereby repealed.

Passed June 3rd, 1868.

"E."

Copy.

Resolved, That the Hamilton Gas-Light and Coke Company does hereby assent to and accept the terms and provisions of the ordinance of the city of Hamilton, entitled "An ordinance to fix the price at which the city of Hamilton may require the Hamilton Gas-Light and Coke Co. to furnish gas for the use of said city and other consumers" passed by the city council of the city of Hamilton June 3, 1868, and the secretary of said Hamilton Gas-Light and Coke Co. is hereby authorized and instructed to file a true copy of this resolution in the clerk's office of said city of Hamilton.

We do hereby certify that a resolution of which the foregoing is a true copy was adopted by the Hamilton Gas-Light & Coke Co. at a meeting held by the directors of said company at the office of the secretary of said company on the third day of June, 1868.

JAS. ROSSMAN,
Pres't of the Hamilton Gas-L't & Coke Co.

106 H. D. MARY,
Secretary of Hamilton Gas-Light & Coke Co.

(Stamp.)

Hamilton, June 6, 1868.

"F."

COUNCIL CHAMBER, TUESDAY EVE., *June* 6, 1871.

Minute Book # 3, pages 280, '1, & '2.

At a meeting of the city council held on the above date the following communication was submitted and read, to wit:

To the honorable the members of the city council of the city of Hamilton, Ohio.

GENTLEMEN: Whereas a certain contract for lighting the streets of the city of Hamilton with gas, entered into by and between the Hamilton Gas Company and the city of Hamilton on the 4th day of June, 1866, expired by its own limitation on the 31st day of May, 1871, and is now inoperative and void; and whereas the city council of the city of Hamilton did, on the 2nd day of June, 1868, pass an ordinance entitled "An ordinance to fix the price at which the city of Hamilton may require the Hamilton Gas-Light & Coke

Co. to furnish gas for the use of said city;" and whereas the provisions of said ordinance were, on the 3rd day of June, 1868, accepted by the Hamilton Gas-Light & Coke Co.;

107 And whereas the first section of said ordinance, among other things, provided that the price at which the Hamilton Gas-Light and Coke Company shall furnish gas for lighting streets shall be fixed at four dollars per thousand cubic feet:

Now, therefore, the Hamilton Gas-Light and Coke Co. hereby respectfully propose to your honorable body that in lieu of and to take the place of the said provision of the first section of the ordinance aforesaid, fixing the price at which the Hamilton Gas-Light and Coke Co. shall light the streets at four dollars per thousand cubic feet, the Hamilton Gas-Light and Coke Co. will enter into a contract with the city of Hamilton to light the streets of said city for and during a period of ten years from and after the entering into and adoption of such said contract.

The terms and stipulations of such contract so to be entered into shall on all matters therein contained be the same as the terms and stipulations contained in the said contract dated June 4th, 1866, save and except that the said contract so to be entered into as hereinbefore proposed shall provide—

1st. For the lighting of said lamps from one-half hour after sunset until one hour before sunrise on each and every night in the year.

2nd. For the said contract taking the place of and standing in lieu of the said provision of the first section of the ordinance hereinbefore named.

108 3rd. For the payment to the said The Hamilton Gas-Light and Coke Co. for lighting the streets of Hamilton as aforesaid at the rate of forty-five dollars per annum for each and every lamp so to be lighted as aforesaid, to be paid monthly, in the manner prescribed in said contract dated June 4, 1866.

All of which is respectfully submitted *to* your favorable consideration.

Hamilton, June 6, 1871.

J. P. TWEED, *President.*
W. W. CAMPBELL.

The foregoing communication was, on motion, received and referred to the committee on gas.

"G."

Minute Book = 3, page 359.

COUNCIL CHAMBER, TUESDAY EVE., *October* 24, 1871.

At a meeting of the city council held on the above date the following entry appears:

The following communication was read, to wit:

"To the hon. the members of the city council of the city of Hamilton.

GENTLEMEN: The proposition heretofore made by the Hamilton

Gas-Light and Coke Co. to the city of Hamilton for lighting the streets lamps during the whole-night season for the sum of forty-five dollars per annum for each post is hereby renewed and
109 is still before your honorable body for consideration.

Hamilton, Ohio, October 24, 1871.

(Sig.) J. P. TWEED, *President.*"

"H."

HAMILTON, O., *Feb'y* 11, 1873.

The Hamilton Gas-Light and Coke Co. would sanction or accept of an ordinance or contract with the honorable city council of Hamilton, O., for the term of the unexpired contract between the aforesaid Ham. Gas-L't and Coke Co. and the city of Hamilton, ending on the 2nd day of June, 1878, to wit:

To supply the city with gas of a good and merchantable quality as now used by the city at four dollars per one thousand cubic feet, the Hamilton Gas-Light and Coke Co. further agreeing to do the lighting and extinguishing, to keep the lamp posts in repair, the city furnishing or paying for the material used in said repairs; also to paint with coal-tar the lamp posts once each year, all of which is to be done at the expense of the aforesaid gas-light and coke Co., in consideration of which the city council shall by ordinance fix the time of lighting and extinguishing as follows:

Nov., Dec., Jan'y, Feb., and March and one hour (1) after sunset during the summer months, April, May, June, July, August,
110 September, and October, to extinguish upon each and every night during the year at 2 (two) o'clock a. m.

The unexpired contract entered into between the Hamilton Gas-Light and Coke Co. and the city of Hamilton upon June 2, 1868, to remain valid and good so far as it does not conflict with the above. The Hamilton Gas-Light and Coke Co. do or will further agree to furnish all necessary lamp posts, or such as may by ordinance be ordered erected, at $30.00 per post, complete.

To the Honorable George F. Elliott, member of city council of Hamilton, Ohio.

J. P. TWEED,
President of Gas Co.

"I."

LAW AND COLLECTION OFFICE OF H. L. MOREY,
HAMILTON, OHIO, *June* 1, 1878.

To the hon. the city council of the city of Hamilton.

GENTLEMEN: The Hamilton Gas-Light and Coke Co. hereby propose and consent to an additional stipulation in the proposed contract for furnishing said city with gas now pending before
111 your honorable body: that in the event that legislative authority is given for making a ten-year contract and a ten-year contract is made as provided in said contract now pending, then and in that case the said company will make a rebate of 50 cents

in each and every one thousand feet of gas so furnished under the five-year contract up to the time such ten-year contract is entered into.

Respectfully, THE HAMILTON GAS-LIGHT AND COKE CO.,
By H. L. MOREY, *Their Attorney.*

"J."

An ordinance providing for entering into a contract with the Hamilton Gas-Light and Coke Co. for furnishing and supplying the city of Hamilton with coal gas for lighting the streets, alleys, and public grounds of said city for a period of five years from and after the 3rd day of June, 1878.

SEC. 1. Be it ordained by the city council of the city of Hamilton, Ohio, That said city enter into a contract with the Hamilton Gas-Light and Coke Co. for furnishing and supplying said city with coal gas for lighting its streets, alleys and public grounds for a period of five years, from and after June 3, 1878, in the words and figures and upon the terms following, which when signed and sealed as provided in sec. 2, of this ordinance shall become and by the
112 valid binding contract of said city, to wit:

This agreement entered into the 17th day of June 1878 by and between the Hamilton Gas-Light and Coke Co. and city of Hamilton Ohio, witnesseth,

That the said company for and in consideration of the covenants and agreements on the part of the said city hereinafter contained hereby agrees and binds itself, to supply and furnish to said city good merchantable coal gas of the legal standard and quality in Ohio, and of sufficient quantity at all times to supply and light the streets alleys, and public grounds in said city for the full and entire period of five years, from and after June 3rd, 1878 and to be fully ended and completed on June 3, 1883.

In consideration whereof, the said city hereby agrees and binds itself to cause to be lighted according to the schedule and time-table following, to wit:

(Here follows schedule and time-table.)

113 For and during said entire period of five years its street lamps now erected in its streets, alleys and public grounds to the number of not less than three hundred and all other lamps which may hereafter during said five years be erected or ordered lighted during the said 5 y'rs by said city & its streets alleys & public grounds from the time they are so erected or ordered lighted to the end of said entire period of five years, and that said lamps now erected in said city shall not during its said entire period be diminished in number or removed from their present location to light other streets, alleys and public grounds or other parts thereof in said city not now laid with street mains, and that any additional

lamps that may be hereafter during said period erected in said city shall not be removed or diminished in number during said period and all lamps now erected in said city above three hundred in number, which may hereafter during said period be ordered by said city to be lighted shall be continued to be lighted to the end of said period according to said schedule and time-table, unless said lamps over and above said three hundred shall be ordered discontinued by ordinance of city council, of which discontinuance said company shall have one month previous notice.

Said city further agrees and binds itself during said entire period to buy and receive from said company said gas in sufficient quantity to light according to said schedule and time-table said three hundred lamps and said lamps now erected in said city, above three hundred in number which may hereafter during said period be ordered by said city to be lighted, and all lamps which may hereafter during
114 said period, be erected in said city to the end of said period, using a four-foot burner on each and every one (1) of said lamps, that the city will pay said company the sum of two and twenty-five hundredths (2.25) dollars for each and every one thousand cubic feet of gas, so furnished and supplied to said city by said company, the amount of gas so furnished and supplied to said city and used in lighting said lamps to be ascertained by multiplying four feet, the size of said burners by the number of hours said lamps are so lighted according to said schedule and time-table. In case any of said lamps go out or fail to burn before twelve o'clock without fault of said city then said lamp or lamps so going out, or failing to burn, shall not be measured or counted for such night and in case any of said lamps go out or fail to burn after twelve o'clock without fault of said Co., same shall nevertheless be measured and counted.

It is agreed upon the part of said city that if at any time during said period of five years said company shall fail temporarily to furnish and supply said gas, from causes or accidents which could not with ordinary care be avoided, such failure shall not work forfeiture of this contract.

Said city agrees to pay for said gas so supplied and furnished monthly, upon bill to be rendered by said company, said city agrees and binds itself forthwith to designate the three hundred lamps so to be lighted and forthwith put the same in good condition and repair and said company agree hereafter during said period of
115 five years to light and extinguish said three hundred lamps, now erected and hereafter during said period ordered to be lighted and all lamps hereafter erected according to said schedule and time-table and to keep said 300 lamps and all other lamps hereafter erected or ordered lighted during said period in good repair and order, the said city furnishing all material necessary therefor, and *and* said city first putting in good condition and repair all additional lamps above said 300 lamps that may hereafter be ordered erected or lighted by said city during said period.

Said city hereby agrees and binds itself to pay to said company for lighting and for extinguishing said lamps and for keeping said lamps in good order and repair the sum of four and twenty-five one-

hundredths dollars for each and every lamp, each and every year during said entire period the same to be paid in equal monthly payments.

In witness whereof said City of Hamilton by its officers and said Gas-Light and Coke Co. by its officers *a* have hereunto set their hands and seals the day and year aforesaid.

[SEAL.] WILLIAM MURPHY,
President of the City Council.
[SEAL.] R. B. MILLIKIN, *City Clerk.*
[SEAL.] L. P. TWEED,
Pres. Ham. Gas-L't & Coke Co.
[SEAL.] D. H. HENSLEY,
Sec'ty of said Company.

116 SEC. 2. That the president of the city council of said city, and the city clerk of said city be and they are hereby empowered, authorized and instructed to affix thereto their names and corporate seal of said city, and to sign the same on behalf of said city of Hamilton.

SEC. 3. That this ordinance shall take effect and be in full force from and after its passage.

Passed June 17, 1878.

"K."

Hamilton Gas-Light and Coke Co.

HAMILTON, OHIO, *November* 30, 1883.

To the honorable the city council of the city of Hamilton, Ohio.

GENTLEMEN: We hereby accept of the ordinance regulating or fixing the price of gas for a term of five years (5) from and after January 1, 1884, passed Nov. 27, 1883.

We also accept of the resolution passed Nov. 20, 1883—a resolution locating and establishing lamp posts—and we hereby agree to make said extensions of gas mains and locate posts as set forth therein.

Very respectfully,
HAMILTON GAS-LIGHT AND COKE CO.
D. H. HENSLEY, *Secretary.*

117 "L."

To the honorable city council of the city of Hamilton, Ohio.

GENTLEMEN: The undersigned, The Hamilton Gas-Light and Coke Co. of Hamilton, Ohio, respectfully submits for your consideration and adoption the following proposition and contract for supplying coal gas for lighting the street lamps, street squares, and all other public places within this city, including the public buildings, and for fixing the price which private consumers shall pay for gas for the period of 10 years:

First, as to the public lighting: It proposes to supply, for the period of ten years from the adoption of this proposition by council, coal gas to light all street lamps now erected and that may be hereafter

erected during said period of ten years for the sum of one dollar and fifty cents per thousand cubic feet, burned through four-foot burners and according to the schedule and time-table now in force between the city and this company for the lighting and extinguishing of said public lamps, which schedule and time-table *as* hereby referred to and made a part hereof.

This proposition is made subject to the proposition of the Hamilton Electric Light Co., of this date, to light High and Main Sts. with electric light and all other streets and public places not now lighted with gas.

118 2nd. It proposes to light, extinguish, clean, and keep in repair all lamps lighted under this contract for the sum of four dollars each lamp each year, the city paying for all materials necessary to keep said lamps and posts in repair.

3rd. It proposes to furnish coal gas to light the city buildings, engine-houses, and all other city buildings for the sum of one dollar and fifty cents a thousand cubic feet, measured through standard meters to be furnished by the gas company.

Payment for all said gas and for lighting, extinguishing, cleaning, and keeping said lamps in repair to be made monthly by the city upon bills rendered by this company therefor, the city agreeing and binding itself to levy annually a sufficient tax to pay those bills, as they mature, upon all the taxable real and personal property within this city. The amount of gas consumed in these street lamps shall be ascertained by multiplying the hours burned according to said schedule and time-table by four, the number of feet consumed each hour, and if any of said street lamps go out any night before twelve o'clock and do not burn after that hour without fault of the city or its agents it shall not be counted for that night; but if it go out after 12 o'c. without fault of the gas Co. or its agents it shall nevertheless be counted as if it had burned all night.

For the private lighting it proposes to furnish gas for the period of ten years to the citizens of this city for all domestic purposes for which such gas is used for the same price as for the public lighting, namely, one dollar and fifty cents per one thousand cubic feet, payable by the consumer at the gas company's office at the end

119 of each month or within five days thereafter, and if not so paid twenty-five cents additional for each thousand feet, fractional parts of a thousand in like proportion, gas to be measured through standard meters furnished by the company and without any additional expense to the consumer.

This proposition to be taken as an entirety, and the city council obliges itself to legally enact the necessary ordinance at once to carry into effect these propositions relating to private consumption.

This company further agrees that all said gas shall at all times average not less than fifteen (15) candle-power, and that the reduction in price from the present contract shall take effect January 1, 1888.

January 17, 1888.

Respectfully submitted.

HAMILTON GAS-LIGHT AND COKE CO.
D. H. HENSLEY, *Sec'y.*

I hereby certify that the above is a true copy.

—— ——, *City Clerk.*

120 "M."

To the hon. city council of the city of Hamilton, Ohio:

The Hamilton Gas-Light and Coke Co., by its proposition herewith submitted, offers to furnish good coal gas at a price so low that it defies competition.

It is a price so low that there are but fourteen cities in the whole United States getting gas at a lower price, and they are the largest cities in the country, or have coal at their doors, while a great majority of the cities of this country and Canada pay a much higher price than is now offered to this city and its citizens.

We offer to light, extinguish, clean, and keep the lamps in repair for a less sum than the same work is done for in any other city in this whole country, the next lowest price for these services being four dollars and a half, and there is but one city in the country for which the work is done for that sum. In all the others the price for this work ranges from 5 to 9 dollars per lamp per year.

We offer to do this work for $4, while in many of those cities in which from $5 to $9 is paid the consumer also pays for the rent of the meter in addition to the amount paid for the gas itself.

We offer you gas of 15-candle power, while the State law requires but twelve.

We propose, if you award us this contract, to spend in this city this year at least thirty thousand dollars in renewing and improving the works. As a part of these improvements we propose to lay a six-inch main through the center of the city from north to south, to be connected in time with other large mains east and west, and construct a large purifying house this year, with the latest and most approved machinery, and erect a large holder to correspond, whereby
a purer and better quality of gas will be made and a more
121 even and regular pressure will be maintained throughout the
entire city.

By the acceptance of this proposition the city and citizens will save this year, as between it and the present contract, nearly if not quite ten thousand dollars, an item which, spread over the whole ten years, will materially reduce the price of even the present low proposition.

It is the desire of the company to reduce the price and thereby popularize the use of gas among the people, well knowing that the lower the price the more is used.

To this end we shall labor, and all we ask is that reasonable consideration and fair play from you and our fellow-citizens which we as business men have a right to expect from all fair-minded, honorable men. In conclucion, we desire to say that if our proposition is adopted and the contract for the public lighting awarded to us and the necessary ordinance passed fixing the price of gas to the private consumer, that the reduction herein offered shall date from the 1st day of this year, anything in the proposition to the contrary

notwithstanding; and this communication may be taken as a part of said proposition to that extent, if thought necessary to protect the interests of the city and citizens.

Respectfully, THE HAMILTON GAS-LIGHT AND COKE COMPANY,
D. H. HENSLEY, *Sec'y.*

Jan'y 17, 1888.

I hereby certify that the above is a true copy.

——— ———, *City Clerk.*

122 And afterwards, to wit, on the 11th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of defendant, clothed in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the West. Division of the Southern District of Ohio, in 6th Judicial District.

THE HAMILTON GAS-LIGHT AND COKE COMPANY, Plaintiff,
vs.
THE CITY OF HAMILTON, Butler County, State of Ohio, Defendant. } # 2411.

John B. Connell, of Hamilton, Ohio, of lawful age, makes oath and says that in the year 1877 the Citizens' Gas Co. of Hamilton, Ohio, was duly incorporated and organized under the laws of the State of Ohio, having its principal place of business at Hamilton, Butler Co., Ohio, *at* the purpose and object of said organization was to procure the lighting by coal gas of the streets and public buildings and places of the city of Hamilton and to furnish light to the inhabitants of said city for their dwelling-, business places, and manufacturies.

That soon after the organization of said The Citizens' Gas Co. the said city of Hamilton, through its city council, advertised for sealed bids for the public lighting of the streets and public places in said city — for the furnishing of light to the inhabitants of said city for their private lighting. The said Citizens' Gas Co. and the said plaintiff, The Hamilton Gas-Light and Coke Co., were competitive and the only bidders at said letting, and the contract of such
123 lighting for a period of 10 years was duly awarded to said Citizens' Gas Co. on account of its bid being much lower and better for the interests of the city and the citizens thereof; and thereupon said company duly entered into a contract in writing in accordance with said award to it and gave bond to said city for the faithful performance thereof on its part.

Soon -hereafter the said plaintiff proposed to said Citizens' Gas Co. to take off its hands the said contract for the public and other lighting and to in all respects carry out and fulfil said contract with the said city of Hamilton for said lighting, although the contract price

for gas under the award to said Citizens' Gas Co. was much less than the price offered in the bid of said plaintiff at said letting.

A transfer of said contract for lighting was accordingly made by and through the city *of* council of said city cancelling the contract entered into with said Citizens' Company, and with the assent of said company contracting with said Hamilton Gas-Light and Coke Co. at the same price for lighting at which said award had been originally made to said Citizens' Gas Co.; and further affiant says not.

JOHN B. CORNELL.

Sworn to before me and signed in my presence by said John B. Cornell this 11th day of January, A. D. 1889.

E. A. BELDEN,
Notary Public, Butler County, Ohio. [SEAL.]

124 And afterwards, to wit, on the 12th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of complainant, clothed in the words and figures following, to wit:

Affidavit of Joseph Andrews and One.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE CO., Complainant,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, Defendant.

Affidavits of Jos. Andrews and Daniel Andrews.

Jos. Andrews and Daniel Andrews, being first duly sworn according to law, make oath and say that they are stockholders and officers in complainant company; that they became such stockholder- & officers and bought a controlling interest in the stock of said company in 1871, at which time the stock of said complainant was owned and controlled by persons residing in said city of Hamilton. They say that at said time said company was operating under an ordinance which fixed the price it should charge and receive for its gas at $4.00 per thousand feet for a period of ten years from and after June 3, 1868, said ordinance being attached to the affidavit of J. J. McMaken, city clerk, filed herein on behalf of defendants, marked "Exhibit D."

Affiants further say that shortly after they purchased a controlling interest in said company they voluntarily reduced the
125 price of gas to private consumers to $3.00 per thousand feet, at which price they continued to furnish said gas until 1877, when they again voluntarily proposed — the said council to reduce the price of gas furnished for the public lighting to $2.50 per thousand feet, and this proposition was in the possession of said council long before the time it received bids in answer to its adver-

tisements and was the only bid or proposition presented by said complainant at that time, and it was not a bid or proposition in response to said advertisement.

Affiants say they have read the affidavit of Daniel H. Hensley filed herein, and that all the allegations contained therein concerning said Citizens' Gas Company and said awarding of the contract to it by said council and the final disposition thereof and all other matters subsequent thereto as contained in said affidavit are true, and they adopt the same and make it a part of this affidavit.

And further affiants say not.

JOSEPH ANDREWS.
DANIEL ANDREWS.

Subscribed in my presence and sworn to before me this 12th day of January, 1889.

ERNST REHM,
Notary Public, Hamilton County, Ohio. [SEAL.]

126 And afterwards, to wit, on the 12th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of complainant, clothed in the words and figures following, to wit:

Affidavit of D. H. Hensley.

Circuit Court of the United States, Southern Dist. of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE CO., Complainant,
vs.
THE CITY OF HAMILTON, Butler County, Ohio, Defendant.

Affidavit of Daniel H. Hensley.

Daniel H. Hensley, being duly sworn according to law, deposes and says that he is now and has been for 18 y'rs last past the secretary of the complainant, and during all said time resided in the city of Hamilton, above named.

He says he has general knowledge of the organization of the Citizens' Gas Company of Hamilton, Ohio, and of its getting a contract from said city for lighting the streets, public grounds and buildings of said city, as alleged in the affidavit of Jno. B. Cornell filed by defendant herein, but he denies that complainant was a competitor with said Citizens' Gas Co. for said lighting, or that complainant recognized or competed with said company or in any way whatever, or that complainant recognized the rights of defendant to receive bids for said public lighting, or that complain-
127 ant put in a bid therefor at the time or in the manner set out in said Cornell's affidavit.

This affiant denies that complainant proposed to said Citizens' Gas Co. at any time to take off its hands its said contract with defendant,

or that it ever did accept the terms of said pretended contract from said Citizens' Gas Company or from any other person for it, or that it ever furnished any gas for any person under and by virtue of said pretended contract, or that any transfer or acceptance of any such contract was ever made to or by complainant, or that complainant furnished gas at the same price contracted for by said Citizens' Gas Company or by virtue of any such contract or arrangement.

Affiant says that in 1877 complainant was getting $3.00 per thousand for all its gas furnished for private lighting, although complainant was authorized by the ordinance of said city then in force to charge $4.00 per thousand and it was receiving $4.00 per thousand for public lighting, and it voluntarily proposed to defendant's council to reduce the price for the public lighting to $2.50 per thousand, which proposition had been pending before said council for some time prior to the pretended organization of said Citizens' Gas Company and was so pen-ing at the time bids were received by said council in answer to its advertisement and was the only proposition of complainant pending before said council at said time, and it made no bid or proposition of any kind in answer to said advertisement.

Affiant says the only bid received in answer to said adver-
128 tisement was one from said pretended Citizens' Gas Co. for $2.25 per thousand feet, which contract was by said council awarded to said Citizens' Gas Company on its giving bond for its faithful performance in the sum of $25,000.00, which bond was given by said Citizens' Gas Co.

But affiant says that said Citizens' Gas Co. never entered upon the performance of said contract and never did anything whatever towards its performance; that it had no plant or works of any kind for the manufacture and distribution of gas at the time it got said contract and never made any effort to procure or build such works, and in short time after it got said contract it procured said council to relinquish and release its said bond of $25,000.00, since which time nothing more was heard of -aid pretended Citizens' Gas Co. until it was resurrected by the affidavit of said Cornell.

Affiant further says that in June, 1878, by virtue of a special act of the General Assembly of the State of Ohio passed May 14, 1878, said city council passed an ordinance entering into a contract with complainant for the public lighting at $2.25 per thousand feet, and shortly afterwards passed an ordinance fixing the price — private consumers at $2.50 per thousand feet, said prices to continue for five years, and which ordinances were accepted and their terms and provisions performed by complainant and which are the only ordinances passed by defendant's council or contract made by complain-
ant and none of which ordinances or contracts were made or
129 entered into by virtue of any contract entered into by said council with said pretended Citizens' Gas Co. or in any other way or by virtue of any other authority or in pursuance of any other arrangement than as hereinbefore set forth.

And further affiant says not.

DANIEL H. HENSLEY.

Subscribed and sworn to before me this 12th day of Jan., 1889.

ERNST REHM,
Notary Public, Hamilton County, Ohio. [SEAL.]

And afterwards, to wit, on the 15th day of January, A. D. 1889, the following affidavit was filed in the clerk's office of said court on behalf of defendant, clothed in the words and figures following, to wit:

Affidavit of John Dirk & One.

Circuit Court of the United States, Southern District of Ohio, Western Division.

THE HAMILTON GAS-LIGHT AND COKE CO., Plaintiff,
vs.
THE CITY OF HAMILTON, Ohio, Defendant. } # 4211.

John Dirk and George T. Reiss, of lawful age, being duly sworn, says that they are residents of the city of Hamilton,
130 O., and have been such residents for many years last past; that each of said affiants is now and has been for three years last past a member of the city council of Hamilton, Ohio.

That said John Dirk is now the president of the said city council, and that said George T. Reiss is now chairman of the committee of light of said city council; that each of these affiants has filled said positions since April, 1888.

That these affiants were members of said city council when the ordinance authorizing the issue of bonds in $150,000.00 was passed by said city council and the vote under said ordinance was taken at the November election of 1888; that should said city council build gas works in said city under and by virtue of said authority that said city expects and intends to build new gas works, entire and complete in every respect, and to the laying of pipes and mains in and through the streets, lanes, alleys, and public places of said city; that said city of Hamilton does not purpose or intend to use any part of the plant of the Hamilton Gas-Light and Coke Co. or its pipes and mains laid through the streets of said city; that should it use any part of said plant of said gas Co. it would expect to use the same upon such terms as might be agreed upon between said city and said gas Co., but should said gas works be built by said city it is the purpose and intention of said city to build entirely new gas works, using no part or portion of the gas works of said The Hamilton Gas-Light and Coke Co.

That in building gas works, should the same be so built,
131 it is not the purpose or intention of said city to in any way disturb or interfere with plaintiff's property or with plaintiff's right to manufacture gas in said city or to distribute or sell the same throughout said city; and further affiants saith not.

JOHN DIRK.
GEO. T. REISS.

Sworn to before me and subscribed in my presence this 14th day of January, A. D. 1889.

GOVERNEUR C. MOREY,
Notary Public, Butler County, Ohio. [SEAL.]

132 And afterwards, to wit, on the 7th day of February, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, Page 218.

This day came the parties and their attorneys, the said defendant having been duly served with the writ of subpœna and having entered its appearance herein by counsel duly authorized in that behalf and having been served with notice of the restraining order heretofore issued herein, and thereupon this cause came on for hearing on complainant's application for a preliminary injunction and was submitted to the court upon the pleadings and the affidavits filed herein by the respective parties and was argued by counsel.

On consideration whereof the court find—

That there was no contractual relation existing between the complainant and defendant at the time of the filing of the bill of complaint in this court, nor were there such contractual relations existing at the time of the passing by the council of said defendant of the ordinances complain*and* of and set forth in said bill of complaint, and that this action involves no question arising under the Constitution or the laws of the United States, and that said defendant is not seeking to impair the obligation of any contract with said complainant and is not seeking to take any property of said complainant without due process of law, nor is said defendant attempting to appropriate any property of the said complainant with-

133 out paying therefor its full value in money in violation of any provision of the Constitution or laws of the United States, and that complainant is not entitled to the relief prayed for in its said bill of complaint.

It is therefore considered, adjudged, and decreed by the court that the said injunction be, and the same is hereby, refused, and that said bill of complaint be, and the same is hereby, dismissed at the costs of the said complainant, and that the restraining order heretofore granted be, and the same is hereby, dissolved.

And thereupon the complainant in open court prayed an appeal to the Supreme Court of the United States, and the court find that the matter in dispute herein, exclusive of costs, is largely in excess of the sum or value of five thousand dollars, and that the complain ant is entitled to such appeal, and the court does therefore allow said appeal and fixes the bond to be given by said complainant therefor at the sum of five hundred dollars.

And afterwards, to wit, on the 8th day of February, A. D. 1889, the following appeal bond *is* filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

THE HAMILTON GAS-LIGHT AND COKE CO.
vs.
THE CITY OF HAMILTON, OHIO.

134 Know all men by these presents that we, the Hamilton Gas-Light and Coke Company, as principal, and Jos. Andrews and Daniel H. Hensley, as sureties, are held and firmly bound unto the City of Hamilton, Ohio, in the sum of five hundred dollars, to be paid to the said The City of Hamilton, Ohio, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severalley, and our and each of our heirs, executors, and administrators, firmly by the- presents.

Sealed with our seals. Dated this 8th day of February, 1889.

Whereas the above-named The Hamilton Gas-Light and Coke Co. has taken out an appeal to the Supreme Court of the United States of America to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Hamilton Gas-Light and Coke Co. shall prosecute its said appeal to effect and answer all its costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOSEPH ANDREWS. [SEAL.]
DANIEL H. HENSLEY. [SEAL.]

Sealed & delivered in the presence of—
J. L. COWEN.
ROBERT C. GEORGI.

135 The above security is approved.

GEORGE R. SAGE,
District Judge of the U. S. C. C., S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Jos. Andrews, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth five thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

JOSEPH ANDREWS.

Sworn to before me the 8th day of Feb., 1889.

R. C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, D. H. Hensley, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth three thousand dollars in real estate in my own name situate in the county of Butler, in said district.

DANIEL H. HENSLEY.

Sworn to before me the 8th day of Feb., 1889.

R. C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

136 THE UNITED STATES OF AMERICA, *Southern District of Ohio, Western Division,* } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a complete and true transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in the clerk's office of said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 12th day of February, A. D. 1889.

B. R. COWEN, *Clerk,*
By ROB'T C. GEORGI, *Deputy.*

137 U. S. Circuit Court, S. D. O., Western Division.

THE HAMILTON GAS-LIGHT AND COKE COMPANY
vs.
THE CITY OF HAMILTON, Butler County, Ohio.

SAGE, *J.:*

This is a motion for a temporary injunction. It appears from the bill that the complainant company was duly incorporated under the general laws of the State of Ohio and organized in the city of Hamilton in the year 1855 for the purpose of manufacturing and supplying gas for the use of the city and of its inhabitants, and that the city by ordinance granted the use and occupation of the streets, alleys, and public places for the laying of pipes and gas mains.

The complainant accepted the terms and conditions of the grant and at large cost erected gas works, provided the necessary machinery and appliances, and laid pipes and mains for the delivery of gas for public and private lighting. The defendant for more than thirty years has accepted complainant's services in furnishing gas as aforesaid, has repeatedly exercised its power conferred by the laws of the State over the complainant, fixing from time to time the price of gas for public and private use, appointing gas inspectors,

and compelling complainant under its directions to lay its
138 mains, and there are at present buried in the streets about thirty miles of gas mains and pipes so laid, the same extending all over said city and covering its three and a half square miles of territory, defendant having compelled complainant to lay its mains along streets on which for long distances there are no buildings of any kind and no private consumption of gas. Complainant further avers that by order of the defendant it has erected upon said streets and connected with said mains five hundred and thirty-two public lamp posts, with lamps, burners, and all other appliances complete, the same being the property of the defendant; that its works are ample to supply all the gas required for public and private use; that it has always complied with every condition and requirement imposed by its charter or by law or by the ordinances of the city or by contract or otherwise, and that it is ready and willing to continue so to do, as it has repeatedly notified the defendant both before and after January 1st, 1889.

On the 27th day of November, 1883, the city council, by ordinance, fixed the price of gas for public and for private consumption for the period of five years from and after January 1st, 1884, the ordinance also providing, as a condition precedent to its taking effect, the laying of certain mains by complainant, which were required exclusively for street lamps along streets a great portion whereof were without dwellings. The complainant assented in writing to the terms of said ordinance, and during the time that it re-
139 mained in force laid, under the orders and direction of said city council, about eight miles of street mains as aforesaid.

On the 2nd of January, 1889, defendant notified complainant that it would no longer receive or use any of the complainant's gas for any purpose, and that it would not pay for any gas furnished by complainant, nor would it allow or permit complainant to use any of said street lamps for the purpose of lighting the streets and public grounds and places of said city after the 1st day of January, 1889, and further ordered complainant to remove without delay all connections between said mains and said lamps, and ordered and directed its servants and employees to light its public buildings by some means other than by complainant's gas.

The bill further avers that the defendant, in furtherance of its purpose to light its streets, public grounds, and public places by other means than by complainant's gas and intending to destroy complainant's property and investments in its said gas works, mains, and pipes "so acquired and made under the laws of the State of Ohio and the ordinances of said city," has already passed an ordinance to issue $150,000.00 of its bonds to erect gas works and manufacture its own gas and lay gas mains in said streets, including the streets already occupied by complainant's mains, and thereby forever deprive complainant of all right to manufacture and supply gas for said public lighting, and that defendant now threat-
140 ens to remove and, unless restrained by the order of this court, will remove and disconnect all said lamp posts and street lamps from their attachments with complainant's said mains and

provide some other means for temporarily lighting said streets and public grounds until said gas works can be completed, and then forever deprive complainant of all rights acquired by its charter and render its said property valueless by taking away from complainant said public lighting, and also by entering into competition with it for the private consumption of gas.

The bill charges that said ordinances and proposed action of the defendant impair the obligation of its contract with the complainant under which complainant's gas works were constructed and the investments of complainant's property were made, and that they are contrary to the provisions of sec. 10, article 1, of the Constitution of the United States, and if carried into effect will destroy the value of the complainant's property and convert the same to the use of the defendant without due process of law and in violation of the provisions of the 14th amendment of the Constitution of the United States.

Finally, the bill charges that no provision has been made by the defendant for compensation to complainant for its property so proposed to be taken and appropriated for the public use, and that if said ordinances are permitted to be carried into effect said property will be taken and appropriated to public use without com-
141 pensation to complainant, in violation of the provision of the Constitution of the United States.

The defendant, admitting the main facts stated in the bill, presents by affidavits copies of the contracts made in pursuanse thereof from time to time by and between the city and the complainant fixing the price of gas to private consumers and the terms and conditions of public lighting, and also the orders and provisions for laying street mains. There is no controversy upon any material fact, nor is there any claim that the complainant has at any time been in default or failed or refused to perform its contracts or the orders of the city council.

The defendant admits that it has refused to receive or pay for gas for the use of the city or for the lighting of its streets from and after January 1, 1889, and that it intends to build and operate gas works of its own to the exclusion of the complainant from any public lighting, and it avows that it has no intention to buy or use any of the mains, pipes, or property of the complainant.

The defendant further denies the jurisdiction of this court, contending that it has the right and the power to do what it proposes to do, and that the acts complained of do not impair any vested rights of the complainant nor amount to an appropriation or deprivation of its property.

If the defendant is right in its contention, no Federal question is involved and this court has no jurisdiction; but the state-
142 ment of the defendant's propositions makes it clear that the question of jurisdiction is so intimately connected with the merits that the two must be considered together.

The complainant was organized under a general law subject to amendment or repeal, the constitution of Ohio forbidding the passage of special acts conferring corporate powers and providing

that corporations may be formed under general laws, which may from time to time be altered or repealed. These constitutional provisions by no means operate to prevent the acquisition of vested rights, nor do they authorize the impairment of those rights when once granted. There is no substantial difference in this regard between corporations chartered or organized under general laws and subject to the constitutional provisions above quoted and corporations organized under the old constitution and under special charters which reserve to the legislature the right of amendment or repeal. Vested rights are as secure in the one case as in the other, the material difference between the two being that under the new system the rights and privileges to be incorporated *is* open to all, whereas under the old system it was limited or might be limited to a favored few.

The provisions of law in force when the complainant company was organized have been substantially carried forward into subsequent acts, and they are to be found without material change in the Revised Statutes of Ohio in the chapter relating to gas com-
143 panies, beginning at section 2478, and in the chapter providing for lighting corporations, beginning at sec. 2492.

The three sections upon which the questions decisive of this cause arise are the following:

First. Section 2480, which provides that if gas companies refuse or neglect for six months to lay pipes and light streets, alleys, and public grounds after requirement and notification by the council the council may lay pipes and erect gas works for lighting such streets, alleys, and public grounds and all other streets, alleys, & public grounds not already lighted, and such companies shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such companies.

Second. Section 2482 enacts that a neglect to furnish gas to the citizens and other consumers of gas or to the corporation by any company in accordance with the prices fixed by the council shall forfeit all rights of the gas company under its charter, and that the council may proceed to erect or by ordinance empower any person to erect gas works for the supply of gas to such corporation and to its citizens, provided that nothing in this section or in sec. 2480 shall operate to impair any contract "heretofore" made between the municipal corporation and the gas company.

Third. Section 2486 provides that the council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the
144 corporation or to purchase any gas works erected therein.

Now, it is claimed that section 2480, by application of the maxim, *Expressio unius, exclusio alterius*, limits the power of the city to erect gas works and lay pipes in the streets to the conditions expressed in the section.

We are of opinion that the true construction of this section is that it states the only conditions, excepting those stated in sec. 2482, under which the city may erect gas works and lay pipes for lighting

streets, to the exclusion from those streets of the gas company already in operation and having its pipes laid in other streets. It is to be noted that under this section the city is empowered to lay pipes in those streets and public places only which are not already lighted.

Upon the failure or neglect for six months to furnish gas to the city and to provide consumers the gas company, under sec. 2482, forfeits all its corporate franchises and rights, and the city is authorized either to erect gas works and supply gas to the entire city and to all consumers or to empower any person so to do.

Section 2486 confers upon the city council a general power, to be exercised whenever deemed expedient and for the public good, to erect gas works at the expense of the corporation or to purchase any gas works already erected therein.

The proposition that this section confers only alternative power, so that its true construction is that the city may erect gas
145 works if there be no gas company already established and in operation, and that if there be such a gas company the city has no power to erect works excepting as provided in sections 2480 and 2482, but is limited to the authority to purchase the gas works already erected therein, is not sound. The true construction is too clearly indicated by the language of the section to be misunderstood. It means exactly what it says, that the city may either build or buy, and the city of Hamilton in this case is not precluded from building by the fact that it has authorized the complainant company to erect gas works and lay its pipes in the streets of the city, and that the company has not made itself liable to forfeiture under sec. 2480 or sec. 2482.

Now, the complainant contends that upon this construction sec. 2486 is in conflict with the Constitution of the United States, because it interferes with its vested rights and impairs its property by diminishing, if not destroying, its value and in effect appropriating it to public use without making compensation. The specifications of this charge have already been stated, as set forth in the bill.

To clearly understand the matter certain propositions must be taken into account.

1. Complainant never had an exclusive right to the use of the streets of the city of Hamilton for laying pipes for conveying gas. That was settled by State *v.* Cincinnati Gas L. & C. Co., 18 O. S., 262.

Section 2485, Revised Statutes of Ohio, which in terms
146 prohibits the grant to any gas company of an exclusive privilege to use the streets, alleys, and public places of the municipality for gas purposes, was enacted subsequent to the incorporation of the complainant, but the decision in 18th O. State. was based upon the law in force when the complainant was organized and granted the use of the streets by the defendant.

The city might therefore at any time have authorized the use of its streets by another and competing gas company.

2. The city when it notified the complainant, on January 2, 1889, to sever the connections between its mains and the street lamps,

which are the property of the city, and that it would no longer receive or pay for gas from the complainant had no contractual relations with the complainant.

The contract of January 1, 1884, for 5 years had expired by its own limitation. The city had from time to time made gas contracts with the complainant, as it had authority to do; but it must be remembered that the power to make the contract necessarily implies and includes the power to refuse to make a contract, and the city had therefore the right to refuse to further contract with the complainant.

3. There is nowhere in any statute and there has not been any provision requiring the city to take gas from the complainant any more than there is or has been any provision requiring any citizen to take gas. Will it be for a moment contended that the complainant could maintain a suit for an injunction to restrain a citi-
147 zen from refusing to take gas from it or using coal oil or gasoline or putting up his own gas works on his own premises on the ground that the chartered rights of the complainant were thereby invaded and the Constitution of the United States violated? Would not the citizen in such case be entitled to at least suggest that he, too, had constitutional rights to be protected?

4. Inasmuch as the city has the right to permit the use of its streets to another gas company, and has also the right to purchase any gas works erected within its limits, what is the difference, in a legal or constitutional view or so far as any impairment of the vested rights or property of the complainant is concerned, between its permitting another gas company to erect its works and lay its pipes in the streets and then purchasing those works and pipes for the purpose of manufacturing and selling gas itself and itself in the first instance erecting gas works and operating them?

5. The fact that the complainant while the contract of January 1, 1884, was in force laid about eight miles of pipe, under orders from the city council, for lighting streets along which there were very few dwellings or buildings and in many places for considerable distance none at all, and that the loss of the street lighting will leave those pipes buried in the ground, unused, and comparatively valueless, while it indicates a great hardship and, we may admit also for the sake of the argument, a great injustice, it does not raise
148 a constitutional question or give this court jurisdiction, for by the force of the propositions above stated, although the complainant was compelled under penalty of forfeiture to lay those pipes, *he* was compelled also to take the risk, which has ripened into certainty, that the city at the expiration of the contract would refuse to renew it upon any terms and would erect its own works.

6. If, as we have found, the city has the right in its discretion to erect gas works, it necessarily follows that it has the right to levy taxes to meet the expense, and that the complainant's property within the city will be, precisely as all other property, subject to that taxation.

7. The authorities cited by complainant are not in conflict with the above propositions. In Gas Company *v.* Louisiana Light Com-

pany, 115 U. S., 650, the gas company was incorporated with the exclusive privilege of making and selling gas in New Orleans, its faubourgs, & in LaFayette for a term of years, and this exclusive privilege was the basis of the decision.

In Greenwood *v.* Freight Company, 105 U. S., 13, the charter of the street-railroad company was special and without any reservation of the right of repeal, and it was held that a repeal and attempted transfer of the company's franchises and track to another impaired the obligation of the contract with the company. In New Jersey *v.* Lord, 95 U. S., 104, it was held that the right to alter, amend, or repeal was not reserved.

149 In N. O. Co. *v.* Rivers, 115 U. S., 674, the company had by legislative grant an exclusive right to supply water to the municipality, and such was also the fact in Louisville Gas Company *v.* Citizens' Gas Company, 115 U. S., 683. In Seibert *v.* Lewis, 122 U. S., 284, the holding that "the remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and that any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void," does not affect this case for the reason that here no contract is violated.

The right of complainant to furnish gas to citizens and other private consumers is not attacked nor threatened. All that is done is the refusal of the city to contract for or receive or pay for gas for its own use and the declaration of its intention to erect works and enter into competition with the complainant for the supply of gas for private consumption, and each of these things it has a right to do. In Atlantic City Water Works *v.* Atlantic City *et al.*, 10 Am. and Eng. Corp. Cases, 59, the city had exhausted its power as to providing a water supply, and the complainant's franchise was exclusive. In the Binghamton Bridge Case, 3 Wallace, 51, the company was granted the franchise to build a bridge across a river in New York, and the charter provided that it should be unlawful for any one to erect a bridge or establish a ferry within a distance of two miles on that river.

150 In this case there is no exclusive grant to the complainant and no obligation imposed upon the defendant to buy the complainant's gas. Moreover, the complainant was always liable to competition.

The circuit judge concurs in the opinion that no Federal question is involved in this cause, and that this court has therefore no jurisdiction.

The motion for a temporary injunction is overruled and the bill dismissed.

Milikin, Hume, Neilan and Follett, attorneys for complainant.

Hull, Neal, Morey, Andrews & Mooney & Isreal William, attorneys for defendants.

SOUTHERN DISTRICT OF OHIO, *ss:*

A true and correct copy of the original on file in this office.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

Attest: B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

151 [Endorsed:] No. 4211. United States circuit court, southern district of Ohio, western division. The Hamilton Gas-Light and Coke Co. *vs.* The City of Hamilton, Ohio. Opinion of Judge Sage. Filed Jan. 30, '89. B. R. Cowen, clerk. —— ——, attorneys.

Endorsed on cover: Case No. 13,493. S. Ohio C. C. U. S. No. 328. The Hamilton Gas-Light and Coke Company, appellant, *vs.* The City of Hamilton, Ohio. Filed February 18, 1889.

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146 U.S. 258

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JAMES H. McKENNE
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Robert Clarke & Co., Printers.] [*August, 1892.*

Supreme Court of the United States.

The Hamilton Gas-Light and Coke Company,
Complainant,

No. 13,493.] *vs.*

The City of Hamilton, Ohio,
Defendant.

ARGUMENT FOR COMPLAINANT.

JOHN F. FOLLETT.
JOHN F. NEILAN.
T. H. KELLEY.
Counsel for Complainant.

Robert Clarke & Co., Printers.] [*August, 1892.*

Supreme Court of the United States.

The Hamilton Gas-Light and Coke Company,
Complainant,

No. 13,493.] *vs.*

The City of Hamilton, Ohio,
Defendant.

ARGUMENT FOR COMPLAINANT.

STAMEMENT OF FACTS.

On January 7, 1889, complainant filed its bill for injunction against the defendant in the United States Circuit Court for the Southern District of Ohio. The cause was heard upon the bill, Motion for the allowance of an injunction (Rec. p. 8) and affidavits. There is, however, no dispute as to the facts alleged in the bill or contained in the affidavits. The decision turned on the law of the case and the correct interpretation of the Statutes of Ohio.

The court refused the injunction asked for by complainant and dismissed the bill at complainant's costs. (Rec. p. 66.)

For the decision of the court below, see Rec. pp. 68–74.

From this decision complainant prayed an appeal to this court which was granted by said trial court.

The following is a true copy of the Bill of Complaint (Rec. pp. 1–5):

BILL OF COMPLAINT.

To the Honorable, The Judges of the Circuit Court of the United States:

Your orator, The Hamilton Gas-Light and Coke Company, above named, complains and says, that it is duly incorporated under the laws of Ohio, and has its place of business in the City of Hamilton, Butler county, Ohio, and that the defendant above named is a municipal corporation, organized under the laws of Ohio, and has, by the last federal census, a population of 12,122, and a corporate area of about three and one-half square miles; that the amount in dispute in this matter exceeds, exclusive of cost, the sum or value of two thousand dollars ($2,000), and arises under the Constitution of the United States.

Your orator further says, that it was organized in said City of Hamilton, in the year 1855, and was duly incorporated under the laws of the State of Ohio, for the purpose of manufacturing and supplying gas to light the streets, alleys, public grounds and buildings of said city, and to supply gas for the general use of said city and its inhabants, and on the 9th day of July, 1855, said city by its council duly passed an ordinance whereby it granted to your orator the use and authorized it to occupy its streets, lanes, alleys, and public grounds for the purpose of laying therein its

pipes and gas-mains, for the purposes aforesaid, in accordance with the laws of the State of Ohio in such case made and provided, and on the 9th day of August, 1855, said city council by an ordinance duly passed declared said gas-works to be highly beneficial to its citizens, and to aid in the successful organization of your orator, and encourage others to take its stock, said defendant became a stockholder therein, and paid into the treasury thereof five thousand dollars ($5,000), being the par value of one hundred shares of its said stock, and in said ordinance reserved the right to appoint at all times one of its own members to vote said stock at all meetings of stockholders of your orator.

Said ordinances went into full operation and effect, and said defendant assumed all the duties and liabilities, and exercised all the privileges of a stockholder, and received all the benefits and advantages derived therefrom so long as it owned said stock. Your orator further says, that it accepted the terms and conditions of said ordinances, and at once entered upon the discharge of the duties imposed upon it by the laws of the State of Ohio, its charter and said ordinances, and ever since said date it has fully executed all said duties as required by the laws of Ohio, governing gas companies, in such case made and provided, and that it has never violated any of the provisions of its said charter, or the requirements of said laws, and that its rights acquired under said charter have never been impaired or lost by any judicial authority whatever, and that the same still remain to your orator in full force and effect.

Your orator further says, that relying upon the

laws of the state and the authority vested by them in municipal corporations, and relying upon said ordinances it has gone to great expense of time and money, and has expended large sums of money in erecting buildings and in furnishing them with the necessary machinery and appliances for the manufacture of gas, and in purchasing and laying down in said streets, public buildings, and grounds and all other public places within said city, by order of said council, all the necessary mains and pipes for the delivery and distribution of its gas for the purposes of public and private lighting as aforesaid. It says it is now and has been at all times ready, able, and willing to discharge all the duties imposed upon it by its charter and the laws of this state, and the orders and resolutions of said council.

Your orator further says, that for more than thirty years last past, defendant has accepted the services of your orator in furnishing said gas, for the purposes aforesaid, by authority of said laws, and has repeatedly from time to time exercised all the power conferred by said laws upon municipal corporations—has repeatedly during said time fixed the price which your orator should charge for its gas so furnished to light said streets, alleys, public grounds, and buildings, and the price it should charge for gas furnished to its inhabitants, which orders, ordinances, and resolutions your orator has always obeyed. The defendant appointed a gas inspector as provided by law, and has repeatedly from time to time during the last thirty years compelled your orator by authority of said laws to lay its mains in the different streets of said city; and there are at present buried in said streets, by

orders of said council, about thirty miles of gas mains and pipes for the distribution of gas to light said streets and public grounds and buildings, and to make the necessary connections therewith. And said mains now form a net-work of iron pipes extending all over said city from its center to its extreme corporate limits in every direction, and cover its three and one-half square miles of territory. That said council has compelled your orator to lay its mains along streets of said city, on many parts of which for long distances there is no habitation, residence, or building of any kind whatever, and along many of which for long distances there is no private consumption of gas whatever. Said mains being laid exclusively for the purpose of conveying gas for public lighting alone, of all which facts said council had knowledge at the time it so ordered said mains laid.

Your orator says, that by orders and directions of said council it has erected upon said mains and connected therewith five hundred and thirty-two public lamp posts, with lamps, burners, and all other appliances complete; and that said lamp posts are now connected with its said mains, and all are in connection with its works for the manufacture of gas, and it is fully able to supply all the needs of said city and its inhabitants with all the gas they require for all kinds of lighting, and for all purposes for which gas is used in said city; and that it has never neglected or refused to furnish the same when required by either said city or its inhabitants or to lay said mains when duly notified by authority of said council, of which ability and willingness it has notified said council, since January 1, 1889.

Your orator says, that on the 27th day of November, 1883, defendant's council duly passed an ordinance whereby it fixed the price which your orator should charge and receive for its gas furnished to light said city and furnished to its inhabitants for the period of five years from and after the first day of January, 1884, which ordinance imposed the laying of certain mains by your orator in streets of said city, as a condition precedent to the going into effect of said ordinance, which mains were required exclusively for the delivery and distribution of gas for street lamps, there being no dwellings along a great portion thereof; to the terms and conditions of which ordinance your orator assented by its written acceptance thereof, filed in the office of the clerk of defendant as required by law, and which ordinance remained in full force until January 1, 1889, and that during the time said ordinance was in force your orator, under the order and direction of said city council, laid about eight miles of street mains as aforesaid.

Your orator further says, that all said gas-works machinery, appliances, and fixtures, and all said gas mains, pipes, and connections therewith buried in the ground and connected as aforesaid with said street lamps, are the property of your orator, and that all said lamp-posts, lamps, and burners thereon are the property of defendant. It further says, that its said property is of great value if used for the purposes for which it was constructed; that it can not be used or applied to any other purpose where it is, and can not be removed for use to any other location, and is of no value, and will be wholly lost to your orator and entirely destroyed unless its present use is continued.

Your orator further says, that defendant by its council on January 2, 1889, notified it that said city would no longer use any of your orator's gas to light its streets or public buildings, nor use any of said gas for any purpose, and would not pay for any gas furnished by your orator for any such purpose after January 1, 1889, and would not allow or permit your orator to use any of the said street lamps or gas posts in connection with your orator's mains for the purpose of being used to light said streets, public grounds, or places within said city, and ordered your orator to remove without delay all attachments and connections between said mains of your orator and said lamp posts of defendant, and ordered and directed its servants and employes to light its public buildings by some other means than by your orator's gas.

And said defendant proposes and intends to light its streets, public grounds, and all its public places within said city by some other means than by your orator's gas, and to enable it to more fully carry out said intention and to destroy your orator's property and investments so acquired and made under the laws of said State of Ohio, and the ordinances of said City of Hamilton, it has already passed an ordinance to issue one hundred and fifty thousand dollars of its bonds to erect gas-works of its own, manufacture gas to be used to light all its streets, public grounds, and buildings, and all public places within said city, and lay gas mains in said streets, including the streets in which your orator's gas mains are already laid under the orders and directions of defendant's council as aforesaid, and thereby forever deprive your orator of all right to manufacture and supply gas for said public

lighting, and it now threatens to remove, and, unless restrained by the order of this court, will remove and disconnect all said lamp posts and other fixtures from their attachments with your orator's said mains, and, unless restrained by the orders of this court, will temporarily light said streets, public buildings and places with some other means than your orator's gas until it builds its said works and lays its said mains, and then forever deprive your orator of all rights acquired by its charter, and forever destroy your orator's vested rights and property and render its said property valueless by taking away from it said public lighting, and also entering into competition with it for the private consumption of gas. That the said ordinances and proposed action of said defendant's council impair the obligation of the contract entered into by said defendant, with your orator, under which the said gas-works of your orator were constructed, and the investments of your orator's property were made, contrary to the provisions of section 10, article 1, of the Constitution of the United States. And, if carried into effect, will destroy the value of your orator's property, and convert the same to the use of said defendant, without due process of law, in violation of the provisions of the 14th amendment to the Constitution of the United States.

And your orator further says that no provision is made in the ordinances passed by defendant's council, or either of them, for compensation to your orator for its property so taken and appropriated for public use, but that, if said ordinances are permitted to be carried into effect, the property of your orator will be taken and appropriated to public use without compensation to your orator, in vi-

olation of the provisions of the Constitution of the United States.

Your orator therefore humbly prays your honors that the said defendant, the City of Hamilton, its mayor and city council, may be restrained and enjoined from proceeding to remove said lamp posts or disconnect the same from your orator's street mains, or from lighting said City of Hamilton by any means or process other than that of your orator's gas, and that the said city, its mayor and council, may be enjoined and restrained from issuing the bonds of the said city, for the purpose of erecting gas-works in said city or for the purpose of providing such gas-works, for the supply of gas, for lighting the streets, lanes, alleys, public buildings and places, and the private consumers of gas, with gas in said city, and that said injunction may, upon the final hearing hereof, be made perpetual, and that your orator may have such other and further relief in the premises as the nature of its case shall require and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, firmly restraining and enjoining said defendant, the City of Hamilton, its mayor and council, from removing or causing to be removed the lamp posts aforesaid, the lamps and burners thereon, or in any way disconnecting the same from the street mains of your orator, and also from proceeding to light the streets, alleys, lanes, public buildings and places of said city by any means other than your orator's gas, and also enjoining and restraining them and each of them from issuing the bonds of said city for the purpose of providing means to erect gas-works and

Your orator says, that on the 27th day of November, 1883, defendant's council duly passed an ordinance whereby it fixed the price which your orator should charge and receive for its gas furnished to light said city and furnished to its inhabitants for the period of five years from and after the first day of January, 1884, which ordinance imposed the laying of certain mains by your orator in streets of said city, as a condition precedent to the going into effect of said ordinance, which mains were required exclusively for the delivery and distribution of gas for street lamps, there being no dwellings along a great portion thereof; to the terms and conditions of which ordinance your orator assented by its written acceptance thereof, filed in the office of the clerk of defendant as required by law, and which ordinance remained in full force until January 1, 1889, and that during the time said ordinance was in force your orator, under the order and direction of said city council, laid about eight miles of street mains as aforesaid.

Your orator further says, that all said gas-works machinery, appliances, and fixtures, and all said gas mains, pipes, and connections therewith buried in the ground and connected as aforesaid with said street lamps, are the property of your orator, and that all said lamp-posts, lamps, and burners thereon are the property of defendant. It further says, that its said property is of great value if used for the purposes for which it was constructed; that it can not be used or applied to any other purpose where it is, and can not be removed for use to any other location, and is of no value, and will be wholly lost to your orator and entirely destroyed unless its present use is continued.

Your orator further says, that defendant by its council on January 2, 1889, notified it that said city would no longer use any of your orator's gas to light its streets or public buildings, nor use any of said gas for any purpose, and would not pay for any gas furnished by your orator for any such purpose after January 1, 1889, and would not allow or permit your orator to use any of the said street lamps or gas posts in connection with your orator's mains for the purpose of being used to light said streets, public grounds, or places within said city, and ordered your orator to remove without delay all attachments and connections between said mains of your orator and said lamp posts of defendant, and ordered and directed its servants and employes to light its public buildings by some other means than by your orator's gas.

And said defendant proposes and intends to light its streets, public grounds, and all its public places within said city by some other means than by your orator's gas, and to enable it to more fully carry out said intention and to destroy your orator's property and investments so acquired and made under the laws of said State of Ohio, and the ordinances of said City of Hamilton, it has already passed an ordinance to issue one hundred and fifty thousand dollars of its bonds to erect gas-works of its own, manufacture gas to be used to light all its streets, public grounds, and buildings, and all public places within said city, and lay gas mains in said streets, including the streets in which your orator's gas mains are already laid under the orders and directions of defendant's council as aforesaid, and thereby forever deprive your orator of all right to manufacture and supply gas for said public

lighting, and it now threatens to remove, and, unless restrained by the order of this court, will remove and disconnect all said lamp posts and other fixtures from their attachments with your orator's said mains, and, unless restrained by the orders of this court, will temporarily light said streets, public buildings and places with some other means than your orator's gas until it builds its said works and lays its said mains, and then forever deprive your orator of all rights acquired by its charter, and forever destroy your orator's vested rights and property and render its said property valueless by taking away from it said public lighting, and also entering into competition with it for the private consumption of gas. That the said ordinances and proposed action of said defendant's council impair the obligation of the contract entered into by said defendant, with your orator, under which the said gas-works of your orator were constructed, and the investments of your orator's property were made, contrary to the provisions of section 10, article 1, of the Constitution of the United States. And, if carried into effect, will destroy the value of your orator's property, and convert the same to the use of said defendant, without due process of law, in violation of the provisions of the 14th amendment to the Constitution of the United States.

And your orator further says that no provision is made in the ordinances passed by defendant's council, or either of them, for compensation to your orator for its property so taken and appropriated for public use, but that, if said ordinances are permitted to be carried into effect, the property of your orator will be taken and appropriated to public use without compensation to your orator, in vi-

olation of the provisions of the Constitution of the United States.

Your orator therefore humbly prays your honors that the said defendant, the City of Hamilton, its mayor and city council, may be restrained and enjoined from proceeding to remove said lamp posts or disconnect the same from your orator's street mains, or from lighting said City of Hamilton by any means or process other than that of your orator's gas, and that the said city, its mayor and council, may be enjoined and restrained from issuing the bonds of the said city, for the purpose of erecting gas-works in said city or for the purpose of providing such gas-works, for the supply of gas, for lighting the streets, lanes, alleys, public buildings and places, and the private consumers of gas, with gas in said city, and that said injunction may, upon the final hearing hereof, be made perpetual, and that your orator may have such other and further relief in the premises as the nature of its case shall require and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only a writ of injunction, firmly restraining and enjoining said defendant, the City of Hamilton, its mayor and council, from removing or causing to be removed the lamp posts aforesaid, the lamps and burners thereon, or in any way disconnecting the same from the street mains of your orator, and also from proceeding to light the streets, alleys, lanes, public buildings and places of said city by any means other than your orator's gas, and also enjoining and restraining them and each of them from issuing the bonds of said city for the purpose of providing means to erect gas-works and

from erecting gas-works in said city, and also that a writ of subpena may issue for the said defendant, and for such other and further relief as the nature of your orator's case may require.

LAWS UNDER WHICH COMPLAINANT ORGANIZED.

Complainant was duly incorporated in 1855, under the following general incorporation law of Ohio. Swan & Critchfield's Statutes, pages 299 and 300:

"Sec. XLIX. That whenever any number of persons, as required by the first section of this act, associate to form gas-light and water companies, for the purpose of supplying gas for lighting the streets and public and private buildings of any city, town, or village of this state, or for the purpose of supplying the inhabitants of any city, town, or village with water, they shall, under their hands and seals, make a certificate which shall specify as follows: the name of said company, and by which it shall be known; the object for which such company shall be formed; the amount of the capital stock of such company; the number of shares of which the said stock shall consist, and the names of the town, city, or village, and county, in which the operations of such company are to be carried on; such certificate shall be acknowledged, certified, and forwarded to the secretary of state, recorded and copied in the same manner as is provided in the second section of this act; and (when) so incorporated, they are hereby authorized to carry on the operations named in such certificate of incorporation, and by the name and style provided in such certificate, shall be deemed a body corporate, with succession, and they and their associates

to have the same general corporate powers as is provided in the third section of this act, and shall be subject to all the restrictions hereafter provided.

"Sec. LIII. Any corporations formed under this act shall have full powers, if a gas company, to manufacture and sell, and to furnish such quantities of gas or water as may be required in the city, town, or village where located, for public and private buildings, or for other purposes; and such corporations shall have power to lay conductors for conducting water or gas through the streets, lands, alleys, squares, in such city, town, or village, with the consent of the municipal authorities of said city, town, or village, and under such reasonable regulations as they may prescribe.

"Sec. LIV. The municipal authorities of any city, town, or village, in which any gas-light or water company shall be organized under this act, are hereby authorized to contract with any such corporation, for the lighting or supplying with water, the streets, lands, lanes, squares, and public places in any such city, town, or village."

On March 11, 1853, the following law was enacted. Curwen Statutes, chapter 1248, page 2164, sections 30, 31, 32, and 33 (51 O. L. 373):

"Sec. 30. That the city council of any city in which gas companies or gas-light and coke companies have been or may hereafter be established, be and are hereby empowered to regulate by ordinance of such city council, from time to time, the price which such gas-light or gas-light and coke companies shall charge for any gas furnished by such companies to the citizens, public buildings, streets, lanes, or alleys, in such cities, and that said gas-

light or gas-light and coke companies shall in no event charge more for any gas furnished to such city, or to individuals, than the price specified by ordinance of such city council; and that such city council shall also have power by ordinance to regulate and fix the price which such companies shall charge for the rent of their meters.

"Sec. 31. That if such companies shall at any time hereafter be required by any city council as aforesaid, to lay pipes and light any street or streets, and shall refuse or neglect for six months after being notified by authority of such city council to lay pipes and light said streets; then and in that case such city council may lay pipes and erect gas-works for the supply of said streets, and all other streets which are not already lighted; and the said gas companies, gas-light and coke companies, shall thereafter be forever precluded from using or occupying any of the streets not already furnished with gas pipes of such companies; and such city council may have the right to open any street for the purpose of conveying gas as aforesaid.

"Sec. 32. That a neglect to furnish gas to the citizens or other consumers of gas, or to any city by such companies, in conformity to the preceding section of this act, and in accordance with the prices fixed and established by ordinance of such city council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and any such city council may hereafter proceed to erect, or by ordinance empower, any person or persons to erect gas-works for the supply of gas to such city and its citizens as fully as any gas-light or gas-light and coke com-

pany can now do, and as fully as if such companies had never been created.

"Sec. 33. That the city council of any city in which gas-works are or may hereafter be constructed, shall provide by ordinance for the appointment of one or more gas measurers, whose duty it shall be to inspect all gas meters and certify to the correctness of all bills made against the consumers of gas, and perform such other duties as may be prescribed by ordinance."

Also, an act supplementary to the foregoing, passed April 5th, 1854, Curwen, chap. 1439, p. 2570 (52 O. L. 30), as follows:

"Sec. 1. That from and after the passage of this act, it shall be lawful for the city council of any city in which a gas company has been, or may be hereafter established, to fix from time to time by ordinance the minimum price at which such council shall require such company to furnish gas to the citizens or public buildings of such city, or for the purpose of lighting the streets, alleys, and public grounds thereof, for any period not exceeding ten years; and from and after the assent of said company to such ordinance, by written acceptance thereof, filed in the clerk's office of such city, it shall not be lawful for said city council to require the said company to furnish gas to the citizens, public buildings, public grounds, or public lamps of such city, at a less price during the period of time agreed on, not exceeding ten years, as aforesaid: Provided, that this act shall not operate to impair or affect any contract heretofore made between any city and any gas-light or gas-light and coke company.

"Sec. 2. That the city council of such city may,

at any time after the default mentioned in the thirty-first section of the act to which this is supplementary (c. 1248, p. 2164), by ordinance, permit such gas company to use and occupy the streets of such city for the purpose of lighting the same and furnishing gas to the citizens and public buildings.

"Sec. 3. That any temporary failure to furnish gas shall not operate as a forfeiture, under the thirty-second section of the act to which this is supplementary, unless such failure shall be by the neglect or misconduct of such gas-light or gas-light and coke company; Provided that such company shall, without unnecessary delay, repair the injury and continue to supply such gas."

The foregoing are all the laws of Ohio, on the subject, up to 1855, when complainant was incorporated and organized.

Immediately after the corporation of said company, it commenced the construction of gas-works, and the laying of mains in the said city of Hamilton, for the purpose of carrying out the provisions of its charter. Since the organization of said company, it has at all times fully complied with all the provisions of the laws of the State of Ohio, regulating gas companies, and the price of gas furnished by them, has erected, and is now operating works of ample capacity to supply all the demands for gas in said city, has laid in the streets, lanes, and alleys of said city, more than thirty miles of mains, for the delivery and distribution of gas, a large part of which mains have been laid under orders of city council, solely for the purpose of supplying street lamps.

From the time of its organization to this time,

the Hamilton Gas-Light and Coke Company has not failed in any respect, in the performance of every lawful requirement to the public or private gas consumers of said city.

Said gas company has, at no time since its organization, been guilty of any fault or neglect which, by the provisions of the laws of Ohio, would be grounds for a forfeiture of its charter, and has done nothing to impair its rights and privileges under its charter.

Said city has repeatedly, from time to time, as its council deemed necessary, exercised all the powers conferred by the foregoing laws. (Record, pp. 24–38).

LAWS PASSED SUBSEQUENT TO COMPLAINANTS ORGANIZATION.

Two statutes were passed, affecting only the city of Cincinnati, one April 7, 1865. (Sayler's Statutes, chapter 690, p. 784 (62 O. L. 96), as follows:

"Sec. 1. *City councils shall not grant exclusive privileges to gas companies. Be, etc.*, That it shall not be lawful for any city council of cities of the first class, having a population exceeding one hundred thousand inhabitants, to agree by ordinance, contract or agreement, with any person or persons for the construction or extension of gas-works for manufacturing or supplying the city or its inhabitants with gas, which shall give or continue to any person or persons making such agreement with the city council, the exclusive privilege of using the streets, lanes, commons or alleys, for the purpose of conveying gas to the city, or to the citizens thereof, or which shall deprive the city council of

the right to designate the kind of meter to be used, for the correct measurement of the gas furnished under such agreement, and to provide for inspecting and regulating the same, or which shall not specify the exact quality of the gas to be furnished, and reserve to the city council the right to enforce an exact compliance with such specification, under such rules as the city council may prescribe; nor shall the city council make any such agreement which shall not secure to the city council the right to purchase such works and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement."

The other, passed April 6, 1866, Sayler's Stats., chap. 956, p. 1113 (63 O. L. 189), which was repealed and supplied by an act passed January 26, 1867, Sayler's Stats., chap. 1014, p. 1132 (64 O. L. 7), which repealing act is as follows:

"Sec. 1. That whenever it shall be deemed expedient, and for public good by the city council of any city of the first class, having a population exceeding one hundred and fifty thousand inhabitants, to purchase the gas-works of any incorporated company located in such city, such city council shall, for the above purpose, have the power and are hereby authorized, to issue the bonds of such city in any sum not exceeding three million dollars, payable at such dates, not exceeding forty years, as the city may determine, and bearing a rate of interest not exceeding the legal rate per cent. per annum, at the time such bonds are issued; provided, that no portion of said bonds shall be issued until after the question of the purchase of the gas-works shall be submitted to a vote of the qualified electors of said city, at a special election to be held for

that purpose to be ordered by the city council of said city, of which not less than twenty days' notice shall be given in all the daily papers of said city; and further provided, that at such election the majority of said electors shall decide in favor of such purchase; provided further, that where such election has been held under the act to which this is amendatory, then no election for the same purpose shall be again required.

"Sec. 2. When such purchase shall have been made, said city council shall appoint a board of five trustees, who shall manage the said gas-works and supply said city and the citizens thereof with gas, until their successors shall be elected and qualified, as hereinafter provided.

"Sec. 3. At the annual election occurring next after such purchase, the qualified voters of said city shall elect a board of five trustees, to be known as the trustees of gas-works, who shall hold their offices for the term of five years, except at the first election under this act, at which one person shall be chosen for one year, one person for two years, and one person for three years, and one person for four years, and one person for five years; and, thereafter, one of the said trustees shall be elected annually; and said trustees, and their successors shall receive no salary or other compensation, pay or perquisites of office whatever.

"Sec. 4. The board of trustees provided for in the preceding section shall have power to purchase material, employ laborers, appoint officers, purchase or lease necessary real estate, and erect buildings, extend gas pipes, construct gas-works, manufacture and sell gas and coke, collect gas bills, and other moneys due for gas, coke or other material sold by

them, and disburse the same; to manage and conduct and control said gas-works; to prescribe by by-laws the price of gas and coke, under such rules and regulations as by ordinance the city council may prescribe, and the manner of using gas; and they shall be required to report to the city council as often as said city council may deem proper."

The foregoing statutes are all the statutes that had been passed and were in force prior to the revision and codification of the municipal laws of the state in 1869, relating to the control, by municipal corporations, of gas companies, and the power of such corporations to erect or purchase gas-works. It will not be denied that in the codification and revision of the municipal laws it was not intended to change, alter or amend the existing statutes, and we think upon examination it will be apparent that the laws relating to gas companies, and the rights of municipal corporations in relation thereto, are retained as they existed prior to such revision.

The statutes as codified and revised are found in Sayler's Stats., chap. 31, of the municipal code, or chap. 1709 of the statutes, p. 1997 (66 Ohio L. 218), and are the same as found in the Revised Statutes, secs. 2478 to 2489 inclusive, except slight alterations in the language correcting grammatical errors, etc. We quote from the Revised Statutes, adding thereto the references to prior laws as found in Sayler's Stats., for the purpose of retaining the history of the legislation, and showing the clear intent of the legislature that adopted and passed the Revised Statutes in 1880.

"Sec. 2478. The council of any city or village, in which gas companies or gas-light and coke com-

panies may be established, are hereby empowered to regulate, from time to time, the price which such gas or gas-light and coke companies may charge for gas, furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves, and landing places; and such gas-light or gas-light and coke companies shall in no event charge more for any gas furnished to such corporation or individuals than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies may charge for the rent of their meters." (Curwen, chap. 1248, sec. 30.)

"Sec. 2479. In case the council fixes the minimum price at which it requires any company to furnish gas to the citizens or public buildings, or for the purpose of lighting the streets, alleys, avenues, wharves, landing places and public grounds for a period not exceeding ten years, and the company assents thereto, by written acceptance, filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, not exceeding ten years, as aforesaid." (Curwen, chap. 1439.)

"Sec. 2480. If such companies are at any time required by the council to lay pipes and light any street, alley, avenue, wharf, landing place, public ground or building, and refuse or neglect for six months after being notified by authority of the council, to comply with such requirement, the council may lay pipes and erect gas-works for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds not al-

ready lighted; and such gas companies or gas-light and coke companies shall thereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such companies; and the council may open any street for the purpose of conveying gas as aforesaid." (Curwen, chap. 1248, sec. 31.)

"Sec. 2481. The council may at any time after the default mentioned in the preceding section, permit such gas companies to use and occupy the streets, alleys, and public grounds of such corporation for the purpose of lighting the same and furnishing gas to the citizens and public buildings." (Curwen, chap. 1439, sec. 2.)

"Sec. 2482. A neglect to furnish gas to the citizens and other consumers of gas, or to the corporation by any company in accordance with the prices fixed and established by the council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and the council may proceed to erect, or, by ordinance, empower any person to erect gas-works for the supply of gas to such corporation and its citizens; provided, that nothing in this section or in sections twenty-four hundred and seventy-nine and twenty-four hundred and eighty shall operate to impair or affect any contract heretofore made between any municipal corporation and any gas-light and coke company." (Curwen, chap. 1248, sec. 32.)

"Sec. 2483. A temporary failure to furnish gas shall not operate as a forfeiture, unless such failure is through the neglect or misconduct of such gas-light or gas-light and coke company." (Curwen, chap. 1439, sec. 3.)

"Sec. 2484. The council of any corporation in which gas-works may be constructed, may provide, by ordinance, for the appointment of an officer to be known as inspector of gas, whose duty it shall be to inspect all gas and gas meters, and certify to the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance; and the council shall fix his compensation." (Curwen, chap. 1248, sec. 33.)

"Sec. 2485. It shall not be lawful for any council to agree by ordinance, contract, or otherwise, with any person or persons for the construction or extension of gas-works for manufacturing or supplying the corporation or its inhabitants with gas, which shall give or continue to any person or persons making such agreements with the council the exclusive privilege of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation or to the citizens thereof, or which shall deprive the council of the right to designate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, and to provide for inspecting and regulating the same, or which shall not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe; nor shall the council make any such agreement which shall not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement." (Sayler, chap. 690.)

"Sec. 2486. The council of any city or village

shall have power, whenever it may be deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein." (Curwen, chap. 1248, sec. 31; Sayler, chap. 1014.)

"Sec. 2487. When such purchase shall have been made, the council shall appoint a board of five trustees, which shall manage the gas-works and supply the corporation and the citizens thereof with gas; and the trustees shall serve until their successors are elected and qualified, as hereinafter provided." (Sayler, chap. 1014, sec. 2.)

"Sec. 2488. At the annual election occurring next after such purchase, the qualified voters of the corporation shall elect five trustees, to be known as the trustees of the gas-works, who shall hold their office for the term of five years, except that at the first election one trustee shall be chosen for one year, one for two years, one for three years, one for four years, and one for five years, and thereafter one trustee shall be elected annually; and the trustees shall not receive any compensation for their services." (Sayler, chap. 1014, sec. 3.)

"Sec. 2489. The board may construct gas-works, extend gas pipes, manufacture and sell gas and coke, collect gas bills and other moneys due for gas, coke, or other material sold by it, and disburse the same; manage, control, and conduct the gas-works, prescribe by by-laws the price of gas and coke, under such rules and regulations, as by ordinance the council may prescribe and the manner of using gas; and to carry into effect the provisions of this section, may also purchase material, employ laborers, appoint officers, purchase or lease the necessary real estate, and erect buildings thereon; and they

shall be required to report to the council as often as the council may deem proper." (Sayler, chap. 1014, sec. 4.)

On January 1, 1889, council of defendant passed a resolution that it would no longer use complainant's gas and forbidding it to use defendant's gas posts, lamps, and burners. (Rec., page 19, Ex. "B.")

On January 4, 1889, said council passed an ordinance providing for the issue of one hundred and fifty thousand dollars of defendant's bonds, to provide "the necessary means for the erection of gas-works by said city therein, to supply gas to the city and the citizens thereof." (Rec., pages 21–22, Ex. "C.")

In view of the foregoing facts, we claim:

PROPOSITIONS OF LAW.

1. That there is no law of Ohio authorizing the council of any city, in which there is a gas-works in full operation and fully performing all the duties required by the laws of said state of gas companies, to erect gas-works, or to levy a tax for that purpose.

2. That the Hamilton Gas-Light and Coke Company was organized under the law which secured it against any interference with its business on the part of the city, so long as it fully and faithfully performed all the duties which it undertook by the acceptance of its charter.

3. That the said charter is a contract of the state with said company, the obligations of which the state can not impair by subsequent legislation.

4. That the power vested by the statutes of Ohio in city councils to provide gas-works, is a

power conferred for a public benefit and to supply a public want, and when such benefit has been conferred in a way recognized by the statute as sufficient, and the want does not exist, the power can not be exercised.

5. That neither the state, nor the city representing the state, can engage in any public enterprise in competition with a private corporation organized for the same purpose and fully complying with all the stipulations of the contract embodied in its charter.

6. That giving to the charter of this company the most limited construction in the interest of the company, after inducing the company to make large investments and expend large sums of money in property practically worthless for any other purpose, neither the state nor any of its agencies can engage in the same business at the expense of the people, to the irreparable injury, if not the total destruction of the property of the company.

7. That the city, as the representative of the state, having once exercised its choice of methods provided for supplying light to the city and its inhabitants, and such method having been put into complete and successful operation at large expense, can not adopt another and different method to the detriment of that first adopted, and of those who invested their money upon the faith of pledges thus given by the state.

8. That any act which impairs the obligation of a contract, or nullifies pledges made to induce the investment of money in the public interest and for a public purpose, thereby jeopardizing or destroying such investment, is unconstitutional and void.

9. That if a public exigency should arise or has arisen requiring the City of Hamilton to operate a gas-works, it can only be done by appropriating the property of the present company in the exercise of the power of eminent domain, and paying therefor a just and reasonable compensation, or by purchasing said works, as provided by sec. 2485, Rev. Stat of Ohio.

10. That the gas company can not be deprived of its property without due process of law.

11. That the council of Hamilton has no power to levy a tax to subserve private interests, or for any purpose other than a public purpose, and where the professed purpose is to supply a public want that does not exist, that tax is unauthorized and void.

NO LAW AUTHORIZING DEFENDANT TO ERECT GAS-WORKS.

First. No power is conferred upon the defendant by the laws of Ohio to erect gas-works for the supply of gas to its citizens or for public lighting.

Whether or not such power is conferred depends upon the construction of the statutes of Ohio. Such power is claimed under sec. 2486 of the Rev. Stat. of Ohio, *ante*. Whether this section of the statute was intended to confer the power claimed depends upon the proper construction of the statutes which we have hereinbefore fully set forth, to obviate the necessity of continual recurrence to the volumes in which they are found.

There can be no dispute that, at the time the Hamilton Gas Company was organized and went into operation, no power was vested by the statutes of Ohio in municipal corporations to erect gas-works, except for the purpose of occupying such

portion of the streets of the municipality as the gas company had neglected or refused, upon proper notice, to occupy, and such streets in addition thereto as the gas company had not occupied, and also in cases where the gas company had forfeited its rights under its charter.

Applying to the statutes as they now stand the well-settled rules of construction, it is evident that no power now exists in municipal corporations to erect gas-works where gas-works have been erected and are in operation, except under the same conditions and circumstances.

It can not, we think, be denied that it has never been the policy of the legislation of Ohio to confer upon municipal corporations powers which do not properly pertain to the public interests, or if affecting public interests, which can better and more economically be exercised and managed through private agency under the supervision and control of public officers.

As the statute stood prior to the revision in 1869, no such power was conferred, and in the construction of the statutes as they are now found in the Revised Statutes, it is important and necessary to refer to the history of this legislation, for the purpose of understanding what was intended to be provided for in each of the sections of the statutes relating to gas companies.

"If possible, a statute must be so construed as to make it effect the purpose for which it was intended. The interpreter, in order to understand the subject-matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided; that is, he must call to his aid all

those external or historical facts which are necessary for this purpose, and which led to the enactment." (Endlich on the Int. of Stats., sec. 29.)

Bearing in mind the fact that section 2486 did not appear in the statutes in its present form until the codification or revision in 1869, and that all that was attempted by the legislature at that time was simply to revise and consolidate the municipal laws of the state, it becomes as we think indisputable, that the construction of said section is what we claim for it, viz., to empower the municipal corporation to erect gas-works where there are no gas-works.

"As to codifications and revisions, which, upon a principle which will hereafter become manifest, are held, in general, to repeal the enactments covered by their provisions, it is no doubt true that, like the Revised Statutes of the United States, they must be accepted as the law upon the subject they embrace as it existed when the revision or code went into force, and that, consequently, when their meaning is plain, the court can not recur to the original statutes to see if errors were committed in revising them. Yet it has been conceded that, where, in construing the language of a code or a revision of statutes, there is a substantial doubt as to its meaning, the original statute may be looked at and considered." (Endlich on Int. of Stats., sec. 51.)

And, again, it is a rule of construction, "that construction is to be made of all the parts together, and not of one part only by itself. A survey of the entire statute is almost always indispensable, even when the words are the plainest; for the true meaning of any passage is that which best har-

monizes with the subject, and with every other passage of the statute." (End. Int. of Stats., sec. 35.)

And, again:

"In all these instances, the legislature supplied in the context the key to the meaning in which it used expressions which seemed free from doubt; and that meaning, it is obvious, was not in all cases that which literally or primarily belonged to them. It has been heretofore seen that it is a necessity of proper statutory construction, to give effect to every word, clause, and provision of the enactment. Possibly the most important purpose of the construction of all the parts of a statute together and with reference to one another, is that of giving, by means of such comparison, a sensible and intelligent effect to each, without permitting any one to nullify any other, and to harmonize every detailed provision of the statute with the general purpose or particular design which the whole is intended to subserve. With this end in view, the rule extends to acts and their amendments, which, for this purpose, are regarded as constituting but one enactment, so that no portion of either is to be left without effect, if it can be made operative without wresting the words used by the legislature from their appropriate meaning, and of two constructions equally warranted by the language of an amendment, that is to be preferred which best harmonizes the same with the general tenor and spirit of the act amended. The same rule applies as to acts and their supplements, and still more obviously to codes and revisions. A code, or body of revised laws, should, it is said, be regarded as a system of contemporaneous acts, as established *uno*

flatu. Its various sections relating to the same subject should, if practicable, be construed together, as one, as one act or chapter, or as continuous sections of the same act; and one chapter is to be read with another, relating to the same subject, as one body of law, though collected from independent laws of previous enactment, originally passed at different times and re-enacted by a revisory act. If possible, the various portions of such a code or revision must be so construed as to harmonize with one another. Its general system of legislation upon the subject-matter should be taken into view, and any particular article construed in conformity therewith, unless an intention apart from it be clearly shown; and definitions contained in it are to be construed with reference to its positive enactments *in pari materia.*" (Endlich on Interpretation of Statutes, sec. 40.)

"The intention of the legislature can not be fairly and properly ascertained by seizing on a particular clause or enactment disconnected from all other provisions bearing on the same subject, and giving to the portion thus isolated a literal interpretation. The well-settled rule of judicial exposition is the only safe and just mode of arriving at the true meaning and purpose of legislative acts. It is, that all statutes *in pari materia* are to be construed together, and full effect given, if possible, to every provision. Repugnancy and inconsistency are to be avoided, if possible, for the obvious reason that it would be unjust and unreasonable to impute to the legislature inconsistent intents on the same subject. If one construction will produce contradiction and conflict between different portions of the statute, while another will cause all parts to

harmonize in their practical operation, the latter is to be adopted and the former rejected. *The duty of a court is to look at the whole context, and endeavor to give full effect to all provisions, enlarging or restraining, if needful for the purpose, the literal interpretation of any particular part.*" *Green* v. *Commonwealth*, 12 Allen, 155, 156.

Bishop (Written Laws, sec. 86) speaks of "The conservative force of this doctrine in our jurisprudence, and its overwhelming importance in interpretation."

These rules of construction have been fully recognized and adopted by the Supreme Court of Ohio in numerous cases. In deciding the case of *Hirn* v. *The State*, 1 Ohio St. 15, on page 20, Bartley, J., says:

"It is well settled that several acts *in pari materia*, and relating to the same subject, are to be taken and comprised together in construing them; because they are considered as having one object in view, and acting upon one system. Chancellor Kent says: 'The object of the rule is, to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious.'"

And in the case of *The State ex rel.* v. *Commissioners of Franklin County*, 20 Ohio St. 421, McIlvaine, J., deciding on page 424, says: "Statutes *in pari materia* should be so construed as to give effect to all their provisions."

In the case of *Pancoast* v. *Ruffin*, 1 Ohio, 381, on page 386, the court say: "Statutes should be so construed as to give effect to the intention

of the legislature, and, if possible, render every section and clause effectually operative."

In *Lessee of Allen* v. *Parish*, 3 Ohio, 187–193, the court say: "A statute should be so construed, that the several parts will not only accord with the general intent of the legislature, but also harmonize with each other; *and a construction of a particular clause, that will destroy or render useless any other provision of the same statute, can not be correct. No word ever should be rejected, if the statute will admit of a rational and consistent construction without it.*"

In *State* v. *Blake*, 2 Ohio St. 147–152, the court say: "It is a settled rule of construction that the intention of the lawmaker is to be deduced from a view of the whole, and every part of the enactment, taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the law. And from this it results that *general language found in one part, is to be modified and restricted in its application, when it would otherwise conflict with specific provisions found in another;* and this from the reasonable and almost irresistible conclusion, that when the mind is directed to any particular subject, the language used is more likely to express the intention than general words which might otherwise cover it, but from which it does not appear that the particular case was intended to be provided for."

In *Dodge* v. *Gridley*, 10 Ohio, 173, the charter of the town of Harmar provided that "the said town council shall have full power and authority to prevent *any description of animals* from running at

large in the streets, lanes, alleys, and commons within the town if, in their opinion, the interest, convenience or safety of the inhabitants shall require such prohibition." But the court, construing that charter in connection with an act of the legislature *in pari materia*, regulating estrays, held that the general and comprehensive language contained in the charter of the town of Harmar must be so restrained and qualified by the provisions of the act relating to estrays, as to limit the authority of the town council of Harmar to estrays of residents.

In *Robert, Executor*, v. *Wheeler*, Wright, 697, the court had before it the general practice act of 1831, which provided that "in *no case* shall executors or administrators be compelled to give bond in order to perfect an appeal;" and also the administration act passed four days later, in which it was provided "that executors and administrators, *who have given bond in this state*, may prosecute appeals from one court to another without giving bail on the appeal." Construing these two acts *in pari materia*, the court held that the general language of the practice act, which expressly declared that in *no case* should executors or administrators be compelled to give bond in order to perfect an appeal must, nevertheless, be so construed as to apply only to executors who had given bond in this state, because otherwise, the clause above referred to in the administration act would be meaningless.

In *State ex rel. Manix* v. *Auditor of Darke County*, 43 Ohio St., on page 315, Owen, J., deciding the case, cites with approval, *Allen* v. *Russell*, 39 Ohio St. 337, as follows: "Where all the general statutes of the state, or all on a particular subject, are revised and consolidated, there is a strong pre-

sumption that the same construction which the statutes received, or, if their interpretation had been called for, would certainly have received, before revision and consolidation should be applied to the enactment in its revised and consolidated form, although the language may have been changed."

He also cites *Commissioners* v. *Board of Public Works*, *ibid.*, as follows: "Particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms, and not expressly contradicting the provisions of the prior act, unless such intention is clear."

In the case of the *City of Warren* v. *Davis*, 43 Ohio St. 447, Follett, J., deciding the case on page 449, cites with approval *State ex rel.* v. *Commissioners of Shelby County*, 30 Ohio St. 326 as follows: "Where an act of the legislature, or several acts *in pari materia*, have undergone revision, the same construction will prevail as before revision, unless the language in the new act *plainly requires* a change of construction, to conform to the manifest intent of the legislature." And it was said, "neither an alteration in phraseology nor the omission or addition of words in the latter statute necessarily requires a change of construction. The intent to give the new act a different effect from the old should be clearly manifested."

In *Ash* v. *Ash et al.*, 9 Ohio St. 383, on page 387, Sutliff, J., in deciding the case, says: "It is a well-established rule that in putting a construction upon a revised statute, the mere change in the phraseology does not work a change in the established interpretation of the former statute, unless it evi-

dently appear that such change was intended by the legislature."

To the same effect is the case of *Van Camp* v. *Board of Education of Logan*, 9 Ohio St. 407, 418. Also, *Conger et al.* v. *Barker's Administrator*, 11 Ohio St. 1, 13.

In the case of *Commissioners* v. *Board of Public Works*, 39 Ohio St. 628, Owens, J., deciding, on page 632, says: "Particular and positive provisions of a prior act are not affected."

In the case of *Schultz* v. *Cambridge*, 38 Ohio St. 659, the court decided that in construing statutes "general words, following particular and specific words, must, as a general rule, be confined to things of the same kind as those specified."

In the case of *State ex rel.* v. *Railway Co.*, 37 Ohio St. 157, Johnson, J., deciding, says, on page 170: "The question is, do these sections or either of them authorize this contract? In the construction of either, the other and all other provisions of law *in pari materia* must be considered."

In *State* v. *Jackson*, 36 Ohio St. 281, the court decided: "Whether specific provisions in a statute as to the officers by whom oaths shall be administered in a particular proceeding, have been modified by a subsequent statute empowering another officer 'to administer all oaths required or authorized by law to be administered in this state,' is to be determined, not merely by the words of the general act, but from a consideration of all the legislation on the subject."

In the light of these well-settled rules of construction let us examine the several sections of the statutes relating to the organization of gas companies, and the powers conferred upon municipal

corporations to regulate and control such companies. Section 2478 confers upon council in any municipality, the right to fix the price that may be charged for gas, either to the public or private consumers, and the company is prohibited from charging more for gas than the price thus fixed by council. Section 2479 provides that when council has fixed the minimum price at which it requires any company to furnish gas for a period not exceeding ten years, and the company assents thereto by written acceptance, that the council shall not lower the price during the period of time agreed on, not exceeding ten years.

By the terms of section 2480, if council requires such company to lay pipes and light any street, alley, avenue, wharf, landing place, public ground and building, and such company refuse or neglect for six months after being notified by authority of council to comply with such requirement, the council may lay pipes and erect gas-works for lighting such streets, alleys or public grounds, and all other streets, alleys or public grounds not already lighted; and such companies are thereafter precluded from using or occupying any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such company. This section of the statute is clearly without meaning or force, if section 2486 is susceptible of such construction as is contended for by the attorneys for the City of Hamilton, and as a part of this system of laws is entirely ineffectual. If it was the intention of the legislature to confer power upon a municipal corporation to erect gas-works whenever they deemed it expedient or saw fit so to do, why confer the

power in a limited and restricted sense? If the power existed, or was intended to be conferred upon municipalities, to erect gas-works and lay pipes and mains in streets occupied by an existing gas company, why confer the power to erect gas-works and occupy streets which the gas company for six months have refused or neglected to occupy when required so to do by the city council, and limit the operations of the municipality to the unoccupied streets?

The intention of the legislature to restrict the power of municipal corporations in the erection and operation of gas-works to the unoccupied parts of the streets of a municipality is still further strengthened, indeed we think is made conclusive, by the provisions of section 2482. It is, we think, manifest that it was not intended by the legislature to permit municipalities to construct gas-works to compete, for the purpose of competition alone, with gas-works already constructed, or for the purpose of depriving gas companies of any of the rights and privileges conferred upon them by their charter.

The provisions of 2482 are as follows:

"A neglect to furnish gas to the citizens and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and the council may proceed to erect, or, by ordinance, empower any person to erect gas-works for the supply of gas to such corporation and its citizens."

Why authorize council to erect gas-works when the gas company has forfeited all rights under its

charter by neglect to comply with the provisions of the law regulating such companies if the municipality may erect gas-works when the company has not forfeited its charter, and has failed in no respect to comply with the provisions of the law in relation to gas companies?

This section of the statutes, as well as 2480, is meaningless and without force, if section 2486 is susceptible of the construction contended for by counsel for the City of Hamilton.

Bearing in mind the rule that "it is a necessity of proper statutory construction to give effect to every word, clause, and provision of the enactment," what effect could be given to sections 2480 and 2482, if 2486 is to be construed as vesting an absolute power in municipalities whenever it may be deemed expedient, and for the public good, to erect gas-works at the expense of the corporation, where gas-works already exist and are in operation in the corporation?

In other words, if 2486 authorizes municipalities to erect works where gas companies exist, with full capacity to supply all the wants of the public and of private consumers, and which have complied with all the provisions of the law in relation to such companies, why provide that municipal corporations may erect works where the gas company fails, neglects, and refuses to comply with the provisions of the law, and forfeits its charter rights? If failure to comply with the requirements of the council calls into being the power to erect gas-works by such council, as provided in sections 2480 and 2482, as a punishment of the company so guilty of failure, as a necessary corollary, the power

can not exist where the company complies with all the requirements of council.

"A penal statute designating as subject to its penalties a particular class of persons, exonerates all not belonging to such class." (Endlich on Interpretation of Statutes, sec. 397.)

In looking at the several sections of this statute, and referring to the prior statutes *in pari materia* and considering the history and origin of the several enactments that were finally consolidated under this statute, by the legislature in 1869, it will be manifest that every section of this statute has a meaning, and was intended for a purpose, separate and distinct from every other section of the statute.

Prior to section 2486, the several sections relate to municipal supervision and control of gas-works, giving to the municipality the right to fix the price, to direct where mains shall be laid, to appoint inspectors, to determine the quality of the gas furnished, the correctness of gas meters, and of bills presented to consumers; thus retaining to the fullest extent absolute control of gas companies, in municipal authorities, and protecting in the fullest measure the rights of public and private consumers. But if with all this protection and with all these safe-guards, council should deem it expedient, and for the public good, that the municipality should own and operate its own works, section 2485 provides that in any contract that is made with the gas company, the council shall secure the right to purchase such works and all the appurtenances belonging thereto.

There is running throughout these sections of the statutes a clear negation of the idea that council should run and operate works in opposition to

a gas company, or that a gas company should have its property rights destroyed, and its property practically confiscated by the municipality itself running works in opposition, at the expense of the public, the burden being borne by the public, and the expenses provided for by the tax duplicate.

If the contention of counsel for the City of Hamilton be correct, and the construction they claim for this statute adopted by the court, there is not a gas property in Ohio that is of any value, if the municipality in which they are located desire to confiscate it. There is running throughout the sections prior to section 2486 a manifest purpose to compel gas companies to supply what is apparently recognized as a public want, with as little trouble and cost to the consumer as possible, and with the penalty of failure or neglect being a forfeiture of rights, and the bringing into existence of the power in municipalities to provide the means for supplying the want which the gas company had failed to supply, but with no power to do this in contravention of the rights secured to the gas company by the terms of its charter. In other words every contingency was provided for, for the protection of the public and private consumers against extortion, and to provide for the supply of gas where needed or desired, but no provision was made for the supply of gas in municipalities where there was no gas company, and where private individuals or corporations had not seen fit to supply gas-works. While section 2485 prohibits the making of a contract which shall not secure to the council the right to purchase such works existing in such municipality, yet no provision had been made for carrying into effect the power thus conferred by council.

Section 2486 vests the power in council necessary to meet the want arising upon the contingency contemplated. The full power which the legislature intended to vest in municipalities where works existed, is set forth in the preceding sections; in this section the power is given to erect works where none exist. Any other construction, we insist, nullifies the power conferred in the preceding sections, a result of construction which it is the duty of the courts to avoid when possible.

It is a part of the history of the country to which it is not only the right, but the duty of the court, to refer for the purpose of ascertaining the intention of the legislature, that at the time these statutes were passed, every municipal corporation in the state of any considerable importance, was provided with a gas-works, and where such provision had not been made, the municipality was so small that the legislature did not deem it important that a special board should be organized to manage the gas-works, if one should be erected, and therefore left it with council to manage.

The construction for which we contend, harmonizes and makes effective, each and every section of the statute, makes the provisions of those sections which were intended to provide penalties, for failure on the part of gas companies, to comply with the requirements of council in relation to the price of gas, and the laying of mains, penalties in fact, and the compliance with the provisions of the law, beneficial to gas companies, while the construction contended for by counsel for the City of Hamilton, would make sections 2480 and 2482 absolutely nugatory, and would deprive gas companies, which have fully met and complied with all the require-

ments of the law, and of the city council, of any benefit to be derived therefrom. No such construction will be adopted by the court, unless absolutely compelled so to do.

While the general rule of construction is, that where there are conflicting clauses, which can not be reconciled, the one last in order will prevail, this rule is subject to some modifications, one of which is "that a later clause which is obscure and incoherent, will not prevail over an ealier one which is clear and explicit. Nor, as a statute is to be construed with reference to other statutes *in pari materia* as well as by a general survey of the whole context, and as the various provisions are to be made to stand together, if possible, will such be the result, where, upon a comparison of the entire act with others upon the same subject, there appearing no intention to change the general scheme or system of legislation upon the same, the earlier provision harmonizes, and the latter conflicts with such statute. And it has been seen that a reading of the provisions of the whole statute together, may give to earlier sections, the effect of restricting the meaning of later ones, as well as to the latter, the effect of restricting the operations of the former. (Endlich on Interpretation of Statutes, sec. 183.—)

That the legislature at the time of the revision in 1869, intended to retain the statutes with their several provisions in such revision without alteration or modification, is clearly shown by the arrangement and subject-matter of the several sections of the Revised Statutes, and by the fact that these several sections embrace substantially the provisions of the law, as it existed prior to the revision, and the several sections of the Revised Statutes are

placed in the order of sequence substantially the same as was the order of time of the passage of the several statutes.

While there might be some foundation for the claim that section 2486, if it stood as an independent act, by implication repealed the provisions of sections 2480 and 2482, there is now no foundation whatever for any such claim, for, standing as they do, there is but one inference possible, and that is, that the several sections of the statute were each intended by the legislature to have full force and effect, and that no one should destroy or impair the force and effect of any other one of said sections.

Looking at the history of this legislation, the conclusion therefore is irresistible that the several sections of this statute must be so construed as to give force and effect to each of said sections.

Reading the whole statute together, there can be no doubt as to what was the scheme or system of the legislation upon the subject of gas companies, and municipal regulations and control of the same, and that scheme being found, it is the duty of the court to so construe the statute as to make it effective as well as to harmonize each section with every other.

In the case of *Lima Gas Company* v. *City of Lima*, 4 Ohio Circuit Court Rep. 22, the court, Seney, J., in deciding the case, on page 27, says:

"The establishment of a gas company requires the outlay of a considerable sum of money. It is a risk at least depending upon a great many contingencies as to whether it would be a success. While it is thus upon one hand, on the other it is a great advantage to the city. Among other things,

it enables the city to enforce with greater security its police power. Its establishment is for the mutual benefit of both city and gas company. So the legislature in its wisdom has thrown safeguards and protection around both, preserving to the city the power to control, and to the gas companies its life and existence subject to this power of control."

If a municipal corporation may at will erect gas-works and operate the same by public funds raised by taxation, how can it be said that the life and existence of a gas company is preserved subject to the control of the city, by the provisions of these statutes?

The Hamilton Gas Company has expended large sums of money in the erection of works, the laying of mains, and the furnishing of means and facilities for the supply of gas for the lighting of the streets and public places in said city, as well as for the supply of gas to private consumers. Its charter, we insist, and we shall argue further along, confers upon the company vested rights of which it would be deprived under the construction of section 2486, for which our opponents contend, and this, too, without compensation.

"In general, it may be said to be a proper rule of construction that a statute is not to be so interpreted as to interfere with, or injure the rights of persons without compensation, unless there is no escape from such construction." (Endlich on Interpretation of Statutes, sec. 251.)

"Whenever the language admits of two constructions, it is obvious that the more reasonable of the two should be adopted as that which the legislature intended. If the words of a statute, though capable of an interpretation which would work

manifest injustice, can possibly, within the bounds of grammatical construction and reasonable interpretation, be otherwise construed, the court ought not to attribute to the legislature an intention to do what is a clear, manifest, and gross injustice." (Endlich on Interpretation of Statutes, sec. 258.)

"It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation." (Ib., sec. 273.)

It will not be pretended that at the time the Hamilton Gas Company was organized, there was any statute conferring upon municipal corporations the right to erect gas-works, except where the gas company had failed, neglected, or refused to comply with the requirements made of it by the city council, substantially as set forth in sections 2480 and 2482 of the Revised Statutes. Its money was invested in the erection of works, and the laying of mains under the guarantees given by the statutes. It would be absurd, we think, to deny that it had acquired vested rights, of which it can not be deprived without proper compensation. This right, we think, is secured to it, by the constitutions of both the United States and the State of Ohio, and this court will not adopt such a construction of the statute as will deprive it of its vested rights, unless compelled so to do, and if such construction must

be adopted by compulsion, the court will be required to declare the statute void, because unconstitutional.

But our opponents insist that section 2486 was intended to authorize municipalities to enter into competition with private corporations in the manufacture and furnishing of gas. This we deny, and we confidently assert that it has never been the policy of the State of Ohio to open the door of competition between individuals and private corporations and municipal corporations. While it is true, that upon mere questions of policy, the court will not attempt to control legislative discretion, where a question of doubt arises as to the construction of a statute, susceptible of a construction, equally consistent with a known, established, and uniform policy which must commend itself to the better sense and judgment of the court, that construction will be adopted, rather than a construction which does violence to such established and uniform policy.

The language of section 2486 is, "The council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase any gas-works already erected therein." With the power vested in the city council to fix the price of gas at which it must be furnished by the company to the public and to private consumers upon penalty of forfeiting charter rights, and the further power of directing where mains shall be laid, which must be laid by the company upon penalty of being forever prohibited, in case of failure, from ever occupying any unoccupied portion of the city; thereby securing to the city

and to private consumers, the furnishing of gas at reasonable prices wherever and whenever required, and to the full extent of such requirement, how can it be deemed expedient and for the public good, to erect gas-works?

The simple statement of the condition of affairs existing in the City of Hamilton furnishes, we think, conclusive evidence of fraud on the part of the city, which would require the court, if no other reason could be given for denying the power in the City of Hamilton to erect gas-works, to say that the condition upon which such works could be erected, could not exist.

It is claimed that the exercise of this power is discretionary with the city council, and that the court will not attempt to control this discretion. The complete answer to this claim is found in the decision of the Supreme Court of Ohio in the case of *The State ex rel.* v. *The Cincinnati Gas-Light and Coke Company*, 18 Ohio St., on page 301.

"The ordinance under consideration" (which was an ordinance fixing the price of gas) "is not one of a general character, but operates upon the defendant alone, and was passed under the special authority of the act of 1853. The intention of the legislature in the 30th section of that act was to require incorporated gas companies, over whose charter it had the power of absolute control, to dispose of the gas which they might furnish for public or private use, at fair and reasonable prices. As such prices might vary, with change of time and locality, the act provides for their ascertainment, from time to time, through the agency of the city councils of the cities in which such companies might be established. The discretionary power

given by the act to city councils might have been vested elsewhere, but, wherever vested, the gas companies whose property interests are so vitally affected by it have a right to demand that it shall be honestly exercised for the purposes for which it was given. Suppose the purpose and object to be accomplished by the passage of this ordinance, as alleged in the rejoinder, had been avowed by a preamble, and the price of gas had been fixed by its provisions at twenty-five cents per thousand cubic feet, could this court be called upon to declare any of defendant's franchises or rights forfeited by noncompliance with the requirements of such an ordinance? Both public and private rights are to be protected, and for that purpose we must recognize the fact that a municipal as well as a private corporation can do wrong."

In this case the Supreme Court, construing the same statute which the court is now called upon to construe, declares that gas companies have rights which are to be protected, and that their property interests are so vitally affected by the exercise of powers vested in the city council that they have a right to demand that these powers be honestly exercised for the purposes for which they are given.

"Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, may be impeached for fraud at the instance of persons injured thereby." (Dillon on Munic. Corp., sec. 311.)

There can be no honest exercise of power con-

ferred for the construction of gas-works in a case like the case at bar, where every right of the consumer is fully protected and ample means furnished for the supply of every want.

The pretense of competition in the manufacture and supply of gas being the stimulus to the city council is absolutely groundless. What competition can there be when the city council has and retains, and must retain under the provisions of these statutes, the right to fix the price of gas furnished by the gas company, the right to tax the property of the gas company, as well as all other property in the municipality, for the expense of running and operating its works, retaining to itself the right to furnish gas at such price as the proper officers may desire.

It is manifest that it is not competition but confiscation that is sought. No gas property can be successfully operated in competition with the municipality in which it is located, and a desire to avoid any such contingency, and to remove every pretext for every such attempt as is here made, was the incentive to the provision in the statutes requiring that in any contract the right should be reserved to the municipality to purchase the works.

If fair competition were intended, the court would take notice of the fact that no enterprise of this character ever has been or can be operated as economically by a municipality as it can be by private capital and enterprise, and that where gas may rightfully be obtained at such reasonable price as private capital and enterprise can furnish it, it can never be expedient and for the public good to deprive a private individual or corporation of the

right to furnish gas and vest that right in the municipality.

WHEN COMPLAINANT CHARTERED NO LAW AUTHORIZING DEFENDANT TO ERECT WORKS SO LONG AS COMPLAINANT COMPLIED WITH THE PROVISIONS OF THE STATUTES.

Secondly.—Whatever may be held to be the powers of city councils under the laws as they now stand in relation to the erection of gas-works, as they were at the time the Hamilton Gas-light and Coke Company was chartered, and its charter rights acquired, upon the faith of which its money was invested and expended in the erection of works, the laying of mains and furnishing the means and facilities for fully performing all its duties and obligations, there can be no doubt that such councils could neither erect nor purchase gas-works so long as an existing company complied with all the provisions of the law, and was prepared to, and did, meet all the demands made upon it.

The law as it then stood was as follows:

"That a neglect to furnish gas to the citizens or other consumers of gas, or to any city by such companies, in conformity to the preceding section of this act, and in accordance with the prices fixed and established by ordinance of such city council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and any such city council may hereafter proceed to erect, or by ordinance empower any person or persons to erect gas-works for the supply of gas to such city and its citizens as fully as any gas-light or gas-light and coke company can

now do, and as fully as if such companies had never been created." (S. and C. Stat. 1535, sec. 131.)

It was only the city councils of *such* cities as contained gas companies that had forfeited all rights under their charter, for the reason set forth, that were authorized to erect gas-works. Nowhere in the statutes as they then were, was any power expressly conferred upon municipal corporations to erect gas-works.

Municipal corporations have only such powers as are specifically conferred upon them by statutes.

"It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others: First*, those granted in *express words; Second*, those *necessarily or fairly implied* in, or *incident* to, the power expressly granted; *Third*, those *essential* to the declared object and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act or make any contract, or incur any liability not authorized thereby. All acts beyond the scope of the power granted, are void." Dillon on Municipal Corp., sec. 89, and case cited in note 1.

"Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute and such as may be implied as essential to carry into effect those which are expressly granted." (*Ravenna* v. *Penn. Co.*, 45 Ohio St. 118.) And in deciding this case, Spear, J.,

on page 121, says: "Except as to incidental powers, such as are essential to the very life of the corporation, the presumption is that the state has granted in clear and unmistakable terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation." Citing Cooley on Const. Lim. 233, 234; *Minturn* v. *Larue*, 23 How. (U. S.) 435; *Bloom* v. *Xenia*, 32 Ohio St. 465.

But we think further citation of authorities upon this proposition unnecessary, as the principle is clearly recognized by the Supreme Court of Ohio, and, so far as we know, is nowhere disputed.

The only power conferred upon municipalities in Ohio, to erect gas-works, being a power provided for supplying a public want or necessity, when there is no other means of doing so, in this case, it can not be claimed, under the provisions of the statutes, that there is any grant in *express words*, nor is it a power, *necessarily* or *fairly implied* in or *incident* to any power expressly granted, nor is it *essential* to the objects and purposes of the corporation. It seems clear to us, that the power does not exist, and that any attempt on the part of the City of Hamilton to erect gas-works, said city being already provided with such works, is beyond the scope of the powers granted, and is void.

Complainant, therefore, claims from all the foregoing, that the State of Ohio has not, in fact, conferred upon municipal corporations the power to erect and operate gas-works in such municipal corporations in which gas works already exist, capable of supplying all the wants of such corporations.

But, if our construction on this point be not

correct, and the state has conferred such power, or attempted to do so, then we claim:

IF LAW AUTHORIZES DEFENDANT TO ERECT WORKS, IMPAIRS OBLIGATION OF CONTRACT.

Third. That the conferring of such power is unconstitutional, and, therefore void, being a law impairing the obligation of contracts.

Art. 1. sec. 10, Constitution of the U. S.

The following is a partial list of the authorities that supports the above proposition:

Fletcher v. *Peck*, 6 Cranch, 133.
Dartmouth College v. *Woodward*, 4 Wheat. 518.
Green v. *Biddle*, 8 Wheat. 1.
Providence Bank v. *Billings*, 4 Pet. 514.
Planters' Bank v. *Sharp*, 6 How. 301.
Trustees v. *Indiana*, 14 How. 268.
Piqua Bank v. *Knoop*, 16 How. 369.
Bridge Proprietors v. *Hoboken*, 1 Wall. 116.
Hawthorn v. *Calef*, 2 Wall. 10.
The Binghampton Bridge, 3 Wall. 51.
Miller v. *State*, 15 Wall. 478.
Delaware Railroad Tax Case, 18 Wall. 206.
Greenwood v. *Freight Co.*, 105 U. S. 13.
New Orleans Gas Co. v. *Louisiana Light & Heat Co.*, 115 U. S. 650.
New Orleans Water-Works v. *Rivers*, 115 U. S. 674.
Lincoln Bank v. *Richardson*, 1 Me. 79.
Yarmouth v. *North Yarmouth*, 34 Me. 411.
Coffin v. *Rich*, 45 Me. 507.
State v. *Noyes*, 47 Me. 189, 205.
Backus v. *Lebanon*, 11 N. H. 19.
Grammar School v. *Burt*, 11 Vt. 632.

Welsh v. *Stetson*, 2 Mass. 146.
King v. *Bank*, 15 Mass. 447.
Nicholas v. *Bertram*, 3 Pick. 342.
Central Bridge v. *Lowell*, 15 Gray, 106.
Brighton v. *Wilkinson*, 2 Allen, 27.
Washington Bridge Co. v. *State*, 18 Conn. 53.
Lothrop v. *Steadman*, 42 Conn. 583.
People v. *Manhattan Co.*, 9 Wend. 351.
Brown v. *Hummel*, 6 Pa. St. 86.
Commonwealth v. *Cullen*, 13 Pa. St. 133.
Iron City Bank v. *Pittsburgh*, 37 Pa. St. 340.
Zabriskie v. *Railroad*, 18 N. J. Eq. 178.
Lehigh Valley R. R. v. *McFarlan*, 31 N. J. Eq. 706.
Bailey v. *Railroad*, 4 Harr. (Del). 389.
Canal Co. v. *Railroad Co.*, 4 Gill. & J. 1.
Norris v. *Trustee*, 7 Gill. & J. 7.
Regents v. *Williams*, 9 Gill. & J. 365.
Bank of Dominion v. *McVeigh*, 20 Gratt. 457.
Mills v. *Williams*, 11 Ired. 558.
Bank of State v. *Bank of Cape Fear*, 13 Ired. 75.
Attorney-General v. *Bank of Charlotte*, 4 Jones Eq. 287.
State v. *Hayward*, 3 Rich. 389.
Young v. *Harrison*, 6 Ga. 130.
State v. *Tombeckbee Bank*, 2 Stew. (Ala.) 30.
New Orleans, etc., R. R. v. *Harris*, 27 Miss. 517.
Maysville Turnpike Co. v. *Howard*, 14 B. Mon. 426.
Louisville v. *University*, 15 B. Mon. 642.
Edwards v. *Jagars*, 19 Ind. 407.
Bruce v. *Schuyler*, 4 Gilm. 221.
Bruffett v. *Railroad*, 25 Ill. 353.
Miners' Bank v. *U. S.*, 1 Greene (Iowa), 553.

Gorman v. *Railroad*, 26 Mo. 441.
Michigan State Bank v. *Hastings*, 1 Dougl. 225.
People v. *Jackson Plank Road*, 9 Mich. 285.
Flint Plank Road Co. v. *Woodhull*, 25 Mich. 99.
McRoberts v. *Washburn*, 10 Min. 23.
Stone v. *Mississippi*, 101 U. S. 814.
Sinking Fund Case, 9 Otto, U. S. 700.
Shields v. *Ohio*, 5 Otto, 325.
Jefferson Branch Bank v. *Skelly*, 1 Black, 346.
Mechanics' and Traders' Bank v. *Debolt*, 16 Howard, 369.
Neil v. *Ohio*, 3 How. 720.
Atlantic City Water Works v. *Atlantic City*, 39 N. J. Eq. 367.

That the giving of a charter by the state and its acceptance by the corporation constitutes a contract has not been an open question in this country, since the decision of the *Dartmouth College Case*, 4 Wheaton, 518.

Chief Justice Marshall, in deciding that case, says, page 637:

"The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant."

The consideration of the grant of the charter of the Hamilton Gas-Light and Coke Company was in an eminent degree a public benefit and recognized as such in the legislation of Ohio. Indeed such is the public interest in the objects contemplated in its charter, that no one has ever questioned the right of the state to supervise and regulate the

operations of such companies and to compel them to deal honestly and fairly. But the right to supervise and regulate does not carry with it the right to injure or destroy.

This company was organized to supply a commodity needed alike by the public and by private consumers, and as an inducement to its promoters to organize and expend their money in supplying such necessities, the state said to them the right is reserved and vested in the council to fix the price of gas, and you shall furnish it at the price fixed and you shall also lay your mains so as to light such streets, alleys and public buildings as council may designate, or if you fail to do so, council at your expense may do it, and you shall also be prepared, at all times to furnish gas to those who need and desire it, and a failure on your part, in these respects, shall forfeit your charter and work a surrender of all your rights thereunder and leave council free to supply this need, by erecting gas-works, or by making arrangements with others to do so. All that the law attempted to provide for was the supply of a recognized want, thereby benefiting the public and private consumers of gas and for this benefit gave to this company its charter and thereby made with the company a contract which the Constitution says, shall not be impaired by any subsequent law.

If the full scope of the charter of this Gas Company, as embodied in its articles of association and the laws of the state relating to such companies, their rights and obligations, and the real contract with the state made by the act of incorporation, were written into a special charter, it seems to us there could be no possible contention as to the rights of

this company, and that no lawyer could claim that any right existed in the municipal authorities of the City of Hamilton to either purchase or erect gas-works.

We repeat that, at the time this company was chartered, the law in force permitted municipal corporations to buy or erect gas-works, in cities where gas-works already existed, only in case the company owning such works failed to comply with the legal duties imposed upon it by the acceptance of its charter, and the organization of this company and the expenditure of its money under the provisions of the law then in force, created contract rights and obligations that can not be impaired by subsequent legislation.

State ex rel. v. *Commissioners of Perry Co.*, 5 Ohio St. 497.

Ireland v. *Turnpike Co.*, 19 Ohio St. 369.

Goodale v. *Fennell et al.*, 27 Ohio St. 426.

The duty undertaken by the company being a public duty can not be abandoned by it.

In *Chicago Gas-Light and Coke Company* v. *People's Gas-Light and Coke Company*, 16 Am. and Eng. Corp. Cases, 527, the Supreme Court of Illinois, in September, 1887, decided as follows:

"The appellant bound itself by the contract before the court to surrender and abandon altogether, for one hundred years all the right conferred upon it by its charter to manufacture and vend gas in the west division of Chicago. *Held:* That by so doing it abandoned a public duty, and a court of equity will not aid either party in the enforcement of such contract."

"The contract sought to be enforced in this case was *ultra vires*."

In the opinion rendered by Magruder, Judge, on page 581, he says:

"Under its charter, appellant had the right to make and sell gas to be used for lighting all the divisions of the city of Chicago and all of the streets and buildings therein. It had as much power and authority to lay pipes in the streets of the West Division as in those of the North and South Divisions. By the contract it agreed to lay no mains or pipes in the West Division, nor to furnish or sell any gas to persons living there for a period of one hundred years. It thereby bound itself to avoid the performance of a duty which it owed to the public.

"The manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such grant are of a public nature. Where the right to make and sell gas to the city and its inhabitants, under the conditions here named, is conferred upon a company, it is so conferred as well for the benefit of the public as the company."

A contract necessarily implies mutual rights and obligations, and if the company can not avoid the performance of a duty which it owes to the public, the converse of the proposition is of necessity true, that the public can not avoid the performance of a duty it owes to the company. In fact, a violation of the contract on the part of the public, is necessarily much more disastrous to the company than a violation on the part of the company could be to the public, as the company has

invested large sums of money in its performance while the public has parted with nothing but the *right* to benefit itself.

"A gas company is a corporation in the enjoyment of certain rights and privileges under the state statutes and city charter, and is bound to furnish the citizens with gas, in localities where pipes extend, under reasonable conditions." *Williams* v. *Mutual Gas Co.*, 52 Mich. 499.

This company was organized to supply a public want, and undertook the performance of a duty to the public, in consideration of the rights and privileges granted in the statutes in force at the time of its organization, relating to gas companies. The obligations of the relation into which it entered with the state are mutually binding and obligatory. It can not avoid or evade its duty to the public, but so long as it fully performs that duty, the state or the municipality can not, either directly or indirectly, deprive it of the right so to do.

It is the first and highest duty of every government to deal fairly and honestly with the citizen, and the effort to make the state an intentional party to such a fraud as would be the offering of inducements for the expenditure of large sums of money for the means of performing a public duty and then permit the municipality in which, and for whose benefit such expenditures are made to confiscate the property or render it valuless, is such a reflection upon its integrity and good faith as every citizen and especially the courts should rebuke. Municipalities are but part of the agencies of the state, formed for the more convenient exercise of powers, properly pertaining to the state in the lo-

calities where they exist, and their powers, as we have seen, are limited.

"Municipalities are not voluntary associations; they are political subdivisions created by the legislature in the exercise of its powers of civil government, for the convenient administration of the affairs of the community." Morawetz on Corp., sec. 24.

We think that no one would claim that, under the circumstances, and so long as this company fully and faithfully performs its duties to the public, the state could levy a tax upon the citizen to provide means for supplying even a public want when the means are already provided and ample for that purpose. While the state has the power, or the municipality as representing the state, to provide for a public necessity, its power is exhausted when such provision is made in conformity with the law and under the exclusive supervision and control of the agencies provided.

"It follows as a matter of course that whatever restrictions are placed upon the power of the state, as such, rest equally upon the subordinate bodies politic, created by its authority to be its instruments and agents, and invested with a share of the governmental control. Hence if an ordinance passed by the legislative body of a municipal corporation tends to violate contract obligations, it will undoubtedly be void and of no effect."—Black on Constitutional Prohibitions, sec. 5.

Hestonville R. R. v. *Philadelphia*, 89 Penn. State, 210.

Conceding that under the law as it now stands a city or village in this state, in which there is no gas company, may adopt such means as its council

deems best to supply such want, that council may either erect works, or authorize any other person or corporation so to do, will any sane man seriously claim that having once made the election and induced the expenditure of large sums of money and fully met and supplied the want and accomplished all that the law empowered it to do, its powers remain as in the first instance? Will it be contended that this company has no vested rights?

Can it truthfully be urged that it took nothing by its charter which the council, as an agency of the state, may not invalidate at will? That this company has from the first been, or at least that it is now exposed to the hazard of having the city for a competitor in business, with funds derived from taxation? It is nonsense to make any such a claim or to contend that the law contemplated subjecting those who invested their money, upon the inducements offered, to any such hazards.

Suppose the law creating gas companies and making the grant of power to them, contained a provision something like this: "Provided, however, that nothing herein contained shall be so construed as to prevent any municipality in this state from erecting and operating gas-works of its own at any time it shall see fit to do so."

How many persons would invest their money in gas stocks, and how many gas-works would be built in Ohio under such circumstances? No doubt the citizens of Ohio would still be carrying lanterns at night to aid their passage through the dark, unlighted streets of its cities, and the millions of dollars now invested in gas property would be placed elsewhere. In 1882, there were 814 gas plants in the United States, of the estimated value

of five hundred million dollars ($500,000,000). Of this number, New York, Pennsylvania and Ohio had about three-eighths and fully one-half the entire value; Ohio's share being estimated at one-tenth the whole, or $50,000,000.

In June 1888, the estimated value of the gas property of the United States was $550,000,000, an increase in value of $50,000,000, in six years.

If Ohio continued to maintain the same ratio as in 1882, the value of the gas property within her borders is $55,000,000. If the position assumed by the City of Hamilton is correct, this vast sum of money has no other security or protection than the whim of the city councils of the municipalities in which these gas plants are situated.

Such an interpretation of the law converts every city, town or village in which gas-works are situated, into a vast camp of blackmail, bribery and corruption. Blackmail by councilmen and bribery by the company to save itself from extermination. Such an interpretation is not only unreasonable and unjust to all concerned, but is abhorrent and repulsive to all principles of right, justice and honesty.

AUTHORITY TO ERECT GAS-WORKS CONFERRED FOR PUBLIC BENEFIT DOES NOT EXIST AFTER BENEFIT CONFERRED.

Fourth. That the power vested by the statutes of this state, in city councils to provide gas-works, is a power conferred for a public benefit and to supply a public want, and when such benefit has been conferred in a way recognized by the statute

as sufficient, and the want does not exist, the power can not be exercised.

How is it possible for the city to save any thing by operating works of its own? Where will it acquire any advantage it does not now possess? Upon the contrary does it not assume a great risk by owning and operating gas-works that is assumed by the private company? It now possesses the power of fixing the price at which the company is required to furnish the gas to light these same streets, lanes, alleys, public grounds and buildings; and it is the duty of the company to furnish its gas at that price under forfeiture of its charter. [Sections 2478, 2482.] *Ironton Gas Case*, 37 Ohio St. 47.

It possesses the power of compelling the company to extend its mains and furnish gas to light any street or streets within the city limits under certain penalties set out in section 2480. No matter how cheap the city could furnish gas if it were operating works, it CAN COMPEL the company to furnish it just as cheap or else the company forfeits its charter. It can fix the standard quality of the gas at not less than twelve candle power. [Sections 3557, 2485.]

It can appoint a gas inspector to inspect the gas and gas meters, certify to the bills of private consumers, make tests of the gas and perform such other duties as may be prescribed by ordinance. [Section 2484.]

By section 2485 council can not agree to any of the matters or things prohibited therein. *Cincinnati Gas Co.* v. *Avondale*, 43 Ohio St. 257.

The right is reserved to council to enforce an exact compliance with such specifications, and

under such rules as it may prescribe. And finally it is prohibited from making any agreement that would deprive it of the right to purchase the works and all appurtenances belonging thereto at any time. This section does not directly authorize the purchase of the private works. It was reserved for the next section to complete this power; 2486 is but the sequel—the complement, so to speak, of the powers theretofore impliedly granted by section 2485. The fair construction of that section is, that where there are no gas-works, the city is empowered to construct such; but where works are in operation it directly empowers the city to purchase them.

It follows, therefore, from the foregoing enumeration of the powers vested in council and the duties imposed upon the city, that when it passed an ordinance declaring it necessary for the public good to erect gas-works, issue bonds, and levy a tax to pay the same, its declaration in that regard was a fraud, not only upon the company which had always supplied the public and private want, and was fully competent, able and willing to do so in the future; but it was also a fraud upon the taxpayers of the city.

MUNICIPALITY CAN NOT COMPETE WITH PRIVATE ENTERPRISE.

Fifth. That neither the state, nor the city representing the state, can engage in any public enterprise in competition with a private corporation organized for the same purpose and fully complying with all the stipulations of the contract embodied in its charter.

MUNICIPALITY INDUCING PRIVATE INVESTMENTS CAN NOT DESTROY THEM.

Sixth. That giving to the charter of this company the most limited construction in the interest of the company, after inducing it to make large investments and expend large sums of money in property practically worthless for any other purpose, neither the state nor any of its agencies can engage in the same business at the expense of the people, to the irreparable injury, if not the total destruction, of the property of the company.

These two propositions being somewhat analogous, we will discuss together.

The question is now for the first time distinctly presented for adjudication, whether or not the state is authorized to engage in manufacturing operations which come in competition with private enterprise, or whether the state can legitimately engage in business enterprises in which private citizens or private corporations are engaged, and, if so, whether it is not necessary that the state, in the exercise of its power of eminent domain, should, before embarking in such business, first appropriate the private property so employed, paying therefor its reasonable value.

A few, we think four only, prior to this attempt on the part of the respondent, of the municipal corporations of this country own and operate gas-works, but in no previous instance has the municipality engaged in the business of manufacturing gas, either for its own use or for the purpose of supplying private consumers, where private capital and private enterprise were engaged in the same business and in competition with such private

enterprise. We think it mockery to speak of *competition* between a private citizen or corporation subject to all the limitations and restrictions imposed upon gas companies by the laws of Ohio, with the control of such companies vested in the municipalities in which they exist, and such municipalities. Competition necessarily implies some measure at least of equality of privileges and advantages between the competing parties, and no one will pretend that competition can exist, where on the one side private capital is employed and on the other capital derived from taxation.

On the part of the private individual or corporation, life can only be maintained where profits equal or exceed expenditures. A municipality deriving its funds from taxation levied in the exercise of a sovereignty which is supreme, if permitted to embark in private enterprises, would continue such enterprises, although the profits derived therefrom should be far less than the expenditure. But, we insist, no such power belongs legitimately to the state. Its functions are exhausted when it has provided for public interests and the public welfare. No such power has been vested in the government by either the national or state constitutions, but, on the contrary, the powers not delegated are reserved to the people. The right of a municipality to embark in private enterprises, once recognized and judicially established, will be the beginning of the end of our system of government and unerringly pave the way to communism and anarchy. At present, the tendency of political life and political action is in the direction of communism and socialism, and on all sides can be seen efforts being made to establish a paternal government, whose duty

shall be, not the encouragement of the citizen in personal application and efforts for personal success, but rather the destruction of personality and the substitution therefor of community of interest. The attempt is to demonstrate that that is not the best government which governs least, but that that is the best government which governs most and leaves least to the control and discretion of the citizen.

Cooley in his work on Con. Lim. (4 Ed.) 671, says:

"It is no part of the business of the government to engage in manufacturing operations which come in competition with private enterprise; and the cases must be very peculiar and very rare where a state or municipal corporation could be justified in any such undertaking."

We think no one will question that the manufacture of gas for private consumption at least is a private enterprise. That it is so was directly decided by the Supreme Court of Connecticut in the case of *Norwich Gas-Light Company* v. *Norwich City Gas Company*, 25 Conn., 19, in which the court say:

"The business of manufacturing and selling gas is an ordinary business, like the manufacturing and sale of leather or any other article of trade."

The Supreme Court of Ohio in speaking of the claim of the Cincinnati Gas Company to the exclusive privilege of laying gas pipes in the streets of said city, in the case of the *State ex rel.* v. *The Cincinnati Gas-Light and Coke Company*, 18 Ohio St., on p. 293, say:

"When a franchise so far in restraint of trade, and so pregnant with public mischief and private

hardship, is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of municipal authorities to pass the ordinance or enter into the contract must be free from doubt."

It could not be claimed that any such contract was a contract in restraint of trade, unless the business to which it applied could properly be called a trading business. We think it clear that the business of manufacturing and supplying gas for private consumption at least is strictly a private and trading business, and that it can in no sense be classed among public operations and public interests in which a municipal corporation representing the public may properly embark.

The state can in no case interfere with private rights or private property, except when it becomes necessary to do so in the interest of the public, and then only to the extent required for the promotion of the public interests. In the case of *Buckingham et al.* v. *Smith and Dille*, 10 Ohio, 288 Wood, J., deciding the case, on page 296, says:

"The state, notwithstanding the sovereignty of her character, can take only sufficient water, from *private streams*, for the purpose of the canal. So far the law authorizes the commissioners to invade private right, as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the constitution, provided a compensation be paid in money to the owner."

And in the case of *Giesy* v. *C. W. & Z. R. R. Co.*, 4 Ohio St. 308, it was decided that power to appropriate private property "rests upon the public necessity, and can only be exercised where such necessity exists;" and that "only such interest as

will answer the public wants can be taken; and it can be held only so long as it is used by the company, and can not be diverted to any other purpose."

It may perhaps be claimed that, to properly protect and police a city, its streets should be lighted, and that such lighting is now a public necessity for which the proper municipal authorities may provide in such manner and by the employment of such means as are deemed best. But this is vastly different from engaging in the business of manufacturing gas and supplying the same for private consumption. Public buildings are necessary for various purposes in a municipality, and these it is necessary to heat at some seasons of the year; also public offices are required, and stationery is necessary to be supplied to such offices, and yet would any one pretend that because authority is given to purchase or provide fuel for heating public buildings or stationery for the supply of public offices, such authority carried with it the right to supply fuel for private consumption, or to engage in the business of furnishing stationery upon the part of municipalities? When the public necessity is provided for the power of the municipality is exhausted, and the moment the municipality, under whatsoever pretext, enters the domain properly pertaining to private enterprise, and in which citizens and private corporations have embarked their capital and energies, the judicial hand should be extended to arrest its further progress.

The right to levy taxes for the support of the government rests upon the fundamental idea that such taxes are re-imbursed by the protection bestowed by the government to the property and in-

dividuals so taxed. Taxes are levied upon all property alike, upon the hypothesis that all property is entitled to and receives like protection, and who that is imbued with any sense of justice will dare assert that the government may rightfully tax any property for the purpose of destroying it? In this case the City of Hamilton claims the right to tax the property of the complainant to raise funds to build a gas-works to furnish gas for both public and private consumption, it is claimed in competition with complainant, but in fact to the exclusion of the complainant, so far as relates to public consumption, and practically destructive of the right of complainant to furnish gas for private consumption, since under the law it has a right to fix the price at which the complainant is compelled to furnish gas for private consumption, being at liberty to furnish its own gas at whatever price its proper officers may determine—and this they call *competition*.

Could there be a more potent monopoly or one to be more shunned or dreaded than a municipality incurring an indebtedness which must be a lien upon all the property of all its citizens, and must be paid by taxation, and using the money so obtained for the purposes of alleged competition in private business with those who are thus taxed? This is called destroying monopoly, and is sustained and commended for this reason. With like reason Nero should be commended, for he reached the throne through the assassination of the lawful sovereign. Municipalities like all government agencies, should be confined in their operations within their legitimate spheres, and in the exercise of the power of taxation should be strictly limited to the public

shall be, not the encouragement of the citizen in personal application and efforts for personal success, but rather the destruction of personality and the substitution therefor of community of interest. The attempt is to demonstrate that that is not the best government which governs least, but that that is the best government which governs most and leaves least to the control and discretion of the citizen.

Cooley in his work on Con. Lim. (4 Ed.) 671, says:

"It is no part of the business of the government to engage in manufacturing operations which come in competition with private enterprise; and the cases must be very peculiar and very rare where a state or municipal corporation could be justified in any such undertaking."

We think no one will question that the manufacture of gas for private consumption at least is a private enterprise. That it is so was directly decided by the Supreme Court of Connecticut in the case of *Norwich Gas-Light Company* v. *Norwich City Gas Company*, 25 Conn., 19, in which the court say:

"The business of manufacturing and selling gas is an ordinary business, like the manufacturing and sale of leather or any other article of trade."

The Supreme Court of Ohio in speaking of the claim of the Cincinnati Gas Company to the exclusive privilege of laying gas pipes in the streets of said city, in the case of the *State ex rel.* v. *The Cincinnati Gas-Light and Coke Company*, 18 Ohio St., on p. 293, say:

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purposes for which governments are created, and leave the citizen and private enterprise untrammeled and unaffected by government agencies.

MUNICIPALTIY ELECTING ONE OF TWO METHODS AUTHORIZED, CAN NOT CHANGE ELECTION TO THE DETRIMENT OF THOSE INVESTING CAPITAL UNDER METHOD FIRST ELECTED.

Seventh. That the city as the representative of the state, having once exercised its choice of methods provided for supplying light to the city and its inhabitants, and such method having been put into complete and successful operation at large expense, can not adopt another and different method to the detriment of that first adopted, and of those who invested their money upon the faith of pledges given by the state.

Having once exercised this discretion by permitting the company to use its streets for the laying therein of pipes to convey gas, its power is at an end; and it can not, after the grant is accepted and acted upon, withdraw this consent or in any manner impair its value. It consented to the use of its streets, lanes, alleys and public grounds in which the company could lay its gas pipes; the state vested the company with certain powers and imposed upon it certain duties. All powers to be exercised by the city afterward are clearly *duties* from which the city can not free itself, and which it can not surrender nor bargain away. (Sec. 2485, R. S.)

State v. *Cincinnati Gas Co.*, 18 Ohio St. 262.

State v. *Ironton Gas Co.*, 37 Ohio St. 47.

Cincinnati Gas Co v. *Avondale*, 43 Ohio St. 257.

Both the city and the company are agencies created by the state for certain specific public purposes. Neither can abandon or change the duties imposed without incurring certain penalties. The penalties imposed upon the company are set out in sections 2480 and 2482, Revised Statutes, which in this case have never been incurred.

In 1855, the building and operation of gas-works and all business connected therewith, were but little understood. There were considerable risk and uncertainty connected with the whole business, which was then in its infancy. The only thing that was known beyond doubt was, that the business required the outlay of large sums of money; usually beyond the power of individual wealth, and requiring aggregation of capital to supply, before there was any return from the investment.

Add to this that the municipal corporations of Ohio were poor; had no credit; could not pay their ordinary running expenses, and year after year kept increasing their debts by bonds and "floating orders." Besides it has never been the policy of this state to undertake what can just as well be done by private enterprise. Free governments always encourage the enterprises of their citizens, whether they be of a public or private character.

The lighting of cities is, and was a great public necessity. The state itself was unable or unwilling to undertake to supply this public want in any of its cities, towns or villages. It, therefore, appealed to its private citizens to aid it by investing their money to supply this public want; making certain propositions to them and conferring upon them certain powers which they were to exercise, subject to such reasonable regulations and restraints

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as might be found necessary, from time to time, for the public good, in furtherance of the purpose for which they were created.

ACT IMPAIRING CONTRACT INDUCING INVESTMENTS FOR PUBLIC PURPOSE UNCONSTITUTIONAL.

Eighth. That any act which impairs the obligation of a contract, or nullifies pledges made to induce the investment of money in the public interest and for a public purpose, thereby jeopardizing or destroying such investment, is unconstitutional and void.

IF PUBLIC EXIGENCY REQUIRES RESPONDENT TO OPERATE GAS-WORKS, CAN ONLY DO SO BY APPROPRIATING AND PAYING FOR COMPLAINANT'S PLANT.

Ninth. That if a public exigency should arise, or has arisen, requiring the City of Hamilton to own and operate a gas-works, it can only be done by appropriating the property of the complainant in the exercise of the power of eminent domain, and paying therefor a just and reasonable compensation.

We have said all we deem it necessary to say in the discussion of these two propositions in connection with the discussion hereinbefore of other propositions, and therefore submit them without further discussion.

COMPLAINANT CAN NOT BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Tenth. That the gas company can not be deprived of its property without due process of law.

It is evident that the gas company, by its charter, acquired a vested right, viz: The right to sup-

ply the public and private consumers of the City of Hamilton with gas, at such reasonable prices as council should fix, and large investments have been made in property necessary for that purpose and of little or no value for any other purpose. It is not in the power of the state or city to destroy this property or render it valueless without due process of law.

14th Amendment, Const. U. S., sec. 1; Art. 1, sec. 19, Const. Ohio.

"No legislation is permissible which destroys property or property rights, save such as comes strictly within the police power." *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.

"Limited in the charter of a corporation that it may be altered, amended, or repealed by the legislature, and the power thus reserved is in terms absolute. It is not an unlimited power. Like all legislative powers it is subject to this important limitation, viz: It shall not be so exercised as to impair the obligation of a contract, or to destroy vested rights." *N. H. & D. R. R. Co.* v. *Chapman*, 38 Conn. 56.

"Even a provision in a corporate charter, empowering the legislature to alter, modify, or repeal it, would not authorize a subsequent act which, on pretense of amendment, or of a police regulation, would have the effect to appropriate a portion of the corporate property to public use." Cooley on Const. Lim. 721.

"Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations are sur-

rounded by the same sanctions, and are as inviolable as in other cases." *Shields* v. *Ohio*, 95 U. S. 324.

"Where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." *Commonwealth* v. *Essex Co.*, 13 Gray, 253.

In this case no question of alteration, amendment or repeal of charter or of the laws under which the charter was obtained can arise, for no such attempt has been made, unless it be claimed that such change was made when the legislature codified the municipal laws of the state, but if such alteration or amendment had been made, and if it had the effect claimed for it, it could not take away the property or rights that had become vested in this company.

"The government can not resume a gift once absolutely made to a private person; neither can it resume a like gift to a private corporation." 1 Waterman on Corp. 70, note 1; *City of Louisville* v. *University, etc.*, 15 B. Mon. 642; *Allen* v. *McKean*, 1 Sumner, 276.

It has been the policy of the State of Ohio, and of the Federal Government to protect all citizens in the full and absolute enjoyment of their vested rights and property, and even, when it becomes necessary that it should be taken and appropriated for governmental purposes, full compensation must be made therefor.

If for the public benefit and the promotion of public interests the council of Hamilton deem it advisable to maintain and operate gas-works, and if they have legal authority so to do, this can only

be done by purchasing or appropriating, and paying therefor a fair and reasonable compensation, the plant of the gas company. No one denies that the state has the power of eminent domain, which may be exercised in a proper case, but it is only by the exercise of that power that the state can deprive a citizen or corporation of vested rights and property.

"A franchise granted to an incorporated company is *property*. And there is nothing in its nature or attributes to make it more sacred than any other species of property. Hence the franchise may be taken from the grantee by the state, under the right of eminent domain, and subject to the conditions necessary for the legal exercise of that power. And when adequate compensation is provided, the obligation of the contract is not impaired, but recognized. This is the purport of the authorities, without a dissentient voice. And it makes no difference that the powers of the corporation are thereby suspended, or the corporation itself in fact dissolved." (Black on Constitutional Prohibitons, sec. 72, and cases cited in note 1.)

"The constitution of the United States prohibits the Federal government and the several states from taking private property with out due process of law; and similar prohibitions in the state constitution have from the earliest time, limited the powers of the state legislatures. The exercise of the power of eminent domain, either under an act of congress or a state law, is, therefore, always subject to two conditions; First:—the purpose for which the property is taken must be a public purpose; Secondly:—Just compensation, to be fixed by some tribunal, must be made to the owners of

the property." (Morawetz on Corp., sec. 1087. See also sec. 1044.)

While means for supplying gas and provisions for the same, in a city, is a public purpose where such means are not provided, when such provision is made, the public purpose does not exist and therefore we claim

TAX CAN ONLY BE LEVIED FOR PUBLIC PURPOSE.

Eleventh. That the council of Hamilton has no power to levy a tax to subserve private interests, or for any purpose other than a public purpose, and where the professed purpose is to supply a public want that does not exist, that tax is unauthorized and void.

Loan Association v. *Topeka*, 20 Wall. 655.
Parkersburgh v. *Brown*, 106 U. S. 487.
Allan v. *Inhabitants of Jay*, 60 *Me.* 124.
Lowell v. *Boston*, 111 *Mass.* 454.
Jenkins v. *Andover*, 103 *Mass.* 94.
Morawetz on Corporations, 1085.

The importance of the questions involved in this case, not only to the complainant but the public in general, assures us that their final determination by this court, will accord with the fundamental principles of justice, which characterize the decision of this court.

JOHN F. FOLLETT.
JOHN F. NEILAN.
T. H. KELLEY.
Counsel for Complainant.

146 U.S. 258

Supreme Court of the United States.

THE HAMILTON GAS LIGHT AND COKE COMPANY,
Complainant,

[*No. 13,493*] *vs.*

THE CITY OF HAMILTON, OHIO,
Defendant.

ARGUMENT FOR DEFENDANT.

M. O. BURNS, City Solicitor.

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E. E. HULL,
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DEMOCRAT PRINT, HAMILTON, O.

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BRIEF AND ARGUMENT FOR DEFENDANT.

STATEMENT OF FACTS.

The record in this action discloses the following facts:

The complainant is a private corporation, incorporated and organized under the laws of Ohio, and is a gas company engaged in the manufacture and sale of gas for lighting purposes; the defendant is a municipal corporation in the State of Ohio, and is a city of the third grade, and second class, and at the federal census of 1880 had a population of 12,122.

The complainant was incorporated July 6th, 1855, (Record p. 15, Exhibit A) and built gas works in the City of Hamilton, and is operating the same.

The city passed an ordinance July 9th, 1855, authorizing the complainant to use the streets, lanes, alleys

and public grounds of the city for the purpose of laying down pipes for the conveyance of gas in and through said city for the use of said city and its inhabitants, and gave this privilege exclusively to the complainant for the period of twenty years. (Record p. 24 Exhibit D.)

From that date until the expiration of the twenty years the complainant furnished and sold gas to the defendant and its inhabitants under different contracts regulating price and terms; (Record p. 48 et. seq. Exhibits A, B, C, D, E, F, G, and H) and from date until about the time this action was commenced, made extensions of mains and pipes under the directions of the City Council. (Record p. 25 et. seq.)

After the expiration of the twenty years, and on June 3rd, 1878 the complainant and defendant entered into a contract during which the former sold gas to the latter for five years. (Record p. 56, Exhibits J, K, and L.)

At the expiration of the period provided in the last contract above mentioned, the complainant and defendant again entered into a contract providing the price and terms under which the former sold gas to the latter for five years beginning January 1st, 1884. (Record p. 17, Exhibit E, and p. 58, Exhibit K.)

Shortly before the expiration of this last contract the City Council of Hamilton deemed it expedient and for the public good to erect gas works at the expense of the city, and submitted to the voters of the city the question of issuing and selling bonds of the city for the purpose of providing funds for the construction of gas works. At the election 2412 votes were cast in favor of, and 59 against, and accordingly the City Council passed Dec. 18th, 1888, an ordinance providing for the issuing and sale of such bonds, and

was about to build gas works. (Record p. 4 and p. 21 Exhibit C.)

The City Council on Jan 1st, 1889, passed a resolution reciting that the contract theretofore existing between the complainant and defendant for the lighting of streets and public buildings, expired on that day, and that there was then no contract existing between said parties, and resolving that no contract existed between said parties after said date, and that the city no longer desired said complainant to furnish gas for lighting the streets and public places of said city, and that the defendant would not pay for any lighting that might be done by said complainant after said date, and forbidding to said complainant the use of the lamp posts and other property of said city, and notifying the complainant to remove without delay any attachment or connection with said lamp posts and other property theretofore maintained by said complainant. (Record p. 4 and p. 19, Exhibit B.)

Thereupon the complainant ceased to furnish any lighting for defendant, and on January 7th, 1889, commenced this action in the Circuit Court of the United States for the Southern District of Ohio Western Division.

The bill of complaint alleges substantially the foregoing facts, and claims that the legislation of the State of Ohio, and the ordinance of the City of Hamilton, and the erection and operation by the complainant of said gas works, constituted a perpetual contract between the complainant and the defendant for the manufacture and sale by the former to the latter, all gas for the lighting of streets, public buildings and grounds, and that such action on the part of the defendant amounted to the impairment of the obligation of said contract; and also claimed that the defendant by the construction of its gas works was

about to destroy the complainant's property, and to deprive it of vested rights without due process of law.

The complainant prayed that the defendant might be enjoined "from removing or causing to be removed the lamp posts aforesaid, the lamps and burners thereon, or in any way disconnecting the same from the street mains * * * and from proceeding to light the streets, alleys, lanes, public buildings, and places in said city by any means other than the gas furnished by the complainant * * * from issuing the bonds of said city for the purpose of providing means to erect gas works, and from erecting gas works in said city." [Record p. 5].

The plaintiff also filed a motion for the allowance of an injunction. A temporary restraining order was allowed and the case set for hearing on January 15th, 1889, on plaintiff's application for a temporary injunction. [Record p. 9]. Affidavits were filed by both parties to the action, the defendant filing no answer. The case was heard on complainant's motion for a temporary injunction, and on the petition and affidavits, with exhibits, and argument of counsel.

On February 7th, 1889, the court found "that there was no contractual relation existing between the complainant and defendant at the time of the filing of the bill of complaint in this court, nor were there said contractual relations at the time of the passing by the council of said defendant of the ordinance complained of and set forth in said bill of complaint, and that this action involved no question arising under the constitution or laws of the United States, and that said defendant is not seeking to impair the obligation of any contract with said complainant, and is not seeking to take any property of said complainant without due process of law, nor is said defendant at-

tempting to appropriate any property of said complainant without paying therefor its full value in money in violation of any provision of the Constitution or laws of the United States, and that complainant was not entitled to the relief prayed for in its said bill of complaint."

And the court thereupon refused to allow an injunction and dismissed the bill at the cost of complainant, and dissolved the restraining order theretofore granted. [Record p. 66]

The opinion of the court in deciding the case is found on pages 68 et seq.

JURISDICTION.

The only ground for the jurisdiction of the Federal courts urged by the complainant is that the controversy involves a question arising under the Constitution or laws of the United States.

It is claimed by the complainant that the action of the defendant violates the Constitution of the United States on the following points:

1st. That "no State shall pass any * * * law impairing the obligation of contracts." Section 10, Article 1.

2nd "Nor shall any State deprive any person * * * of property without due process of law. Section 1, Amendment 14.

It nowhere here appears from the bill of complaint, and it is not claimed either that any express contract existed between the parties after January 1st, 1889; or that the defendant has actually taken or is about to actually take any property belonging to the complainant without due process of law.

The complainant, however, claims that by virtue of the laws of Ohio, and its charter, and the ordinance of the defendant authorizing the establishment of gas works, there is, by operation of law, a contract between the complainant and the defendant by which the former is bound to furnish to the latter, and the latter is bound to buy of the former gas for lighting the streets, alleys and public buildings forever, or at least as long as the company sees fit and is able to furnish the gas.

And the complainant therefore claims that the defendant's refusal longer to take and pay for this gas, and the construction by the municipality of its own gas works to supply public lightning, is an impairment of the obligation of this contract within the constitutional inhibition (Section 10, Article I) and so destructive of the value of complainant's property as to come within the purview of Section 1, 14th amendment of the Federal Constitution, which forbids the taking of property without due process of law.

This the defendant denies.

We maintain there is no contract shown to exist, and that it does not appear that the State of Ohio has passed any law by its legislature, or by the municipality impairing the obligation of any contract. And that neither the state nor the city has done anything that amounts to a taking of any of complainant's property without due process of law.

We present our views in full on this subject hereafter in our brief under the heads of "OBLIGATION OF CONTRACT" and "VESTED RIGHTS"—"DUE PROCESS OF LAW," and we only now desire to call attention to the jurisdictional question in the case.

The parties are both resident of the same state, and unless one of the provisions of the Federal Con-

stitution above referred to, has been or is about to be violated, there is no ground of jurisdiction in the Federal courts and the case need go no further. For it is conceded that unless one or both of the constitutional provisions above mentioned are touched by the controversy, then it involves no question under the Constitution or laws of the United States.

This court will therefore not determine any other questions presented by opposing counsels such as the construction of the statutes of Ohio, the city's right to erect gas works or to levy a tax, power to supply a public want, to engage in manufacturing gas, etc. For all of these are subjects of state jurisprudence alone, and have all been decided by the Supreme Court of our State in favor of defendant.

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II

THE STATUTES OF OHIO.

We maintain that the proposition advanced in their brief by complainant's counsel, on page 25, that the defendant has no power under the laws of Ohio, to erect gas works, is not sound.

There is ample authority under the law of Ohio, authorizing the city to erect gas works, and levy a tax for that purpose notwithstanding there may already be a company in full operation performing all the duties required of it by law.

This leads to a consideration of the law relating to gas companies embraced in the Revised Statutes of Ohio, Sections 2478 and 2491 inclusive. These sections are printed in full in the brief of opposing counsel, pages 18 et seq.

The contention between the complainant and the defendant on this point arises on sections 2480 and 2482, 2485 and 2486 which we quote.

SECTION 2480. If such companies are at any time required by council to lay pipes, and light any street, alley, avenue, wharf, landing place, public ground or building, and refuse or neglect for six months after being notified, by authority of the council, to comply with such requirement the council may lay pipes and erect gas works, for lighting such streets, alleys, or public grounds, and all other streets, alleys and public grounds, not already lighted; and such gas companies or gas light and coke companies, shall hereafter be precluded from using or occupying any of the streets, alleys, public grounds or buildings, not already furnished with gas pipes of such companies; and the council may open any street for the purpose of conveying gas as aforesaid. (66 Vol. 218, p. 417; S & C 1534.)

SECTION 2482. A neglect to furnish gas to the citizens, and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council, from time to time, shall forfeit all rights of such company under the charter under which it has been established; and the council may proceed to erect, or by ordinance, empower any person to erect gas works for the supply of gas to such corporation and its citizens; provided that nothing in this section or in sections 2479 and 2480, shall operate to impair or affect any contract heretofore made between any municipal corporation and any gas light and coke company. (66 Vol. 219, p. 419; S & C 1535.)

SECTION 2485. It shall not be lawful for any council to agree by ordinance, contract or otherwise,

with any person or persons, for the construction or extension of gas works for manufacturing or supplying the corporation or its inhabitants with gas which shall give or continue to any person or persons making such agreements with council the exclusive privilege of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation or the citizens thereof, or which shall deprive the council of the right to designate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, and to provide for the inspecting and regulating of the same, or which shall not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specifications under such rules as the council may prescribe; nor shall the council make any such agreement which shall not secure to the council the right to purchase such works, and all the appurtenances thereto, at any time within the existence of such contract or agreement. (66 Vol. 219, p. 422; S & C 902).

SECTION 2486. The council of any city or village shall have power whenever it may deem expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase any gas works already erected there in."

The statutes relating to municipalities were revised May 6th, 1869, and section 2486 was then first enacted, being No. 423 of the municipal code as then passed. (Vol. 66, p. 219 O. L.)

It is claimed that this is only a codification of existing laws and that the true construction of this section merely gives to municipalities having no gas works power to construct, and to municipalities having gas works power to buy, but that under no circumstances did it confer upon municipalities having

gas works, the power to construct. We contend that the revision of the municipal code was not simply the collection of existing statutes, but that in fact it was the re-enactment of all old statutes included in the revision and the enactment in part, at least, of new statutes never before in existence. The sole purpose of this legislation was not, as claimed by opposing counsel, simply to revise and codify the municipal laws of Ohio, but it was to enlarge and amend the duties and powers of municipalities, and specifically repeal, as it did, all former laws relating to towns and cities. Before this they had been designated as towns and cities; hereafter they were to be known as municipal corporations. New subjects are for the first time treated, new sections for the first time passed.

We think complainant's counsel wholly misconceive the purpose of section 2486 when they claim that it operated simply as an enlargement or explanation of Sections 2480 and 2482, enabling the city to build when the gas companies make default or when no private company was in existence; and of section 2485 enabling the city to buy when the gas companies acquiesce.

As we understand it, section 2486 confers unconditional and plenary power upon the city authorities to build and operate its own works whenever the city council might deem it expedient and for the public good, and that this power is not hampered or qualified in the least by any inquiry as to whether gas works already exist or not. Where the LANGUAGE of the statute shows a change was intended by the Legislature, the effect must be given to this intention.

Endlich Inter. Stat. Sec. 8.

The revised law relating to municipal corporations shows a manifest legislative intent that plainly

requires a change, or extended meaning, application and construction.

When the language of the statute is plain and explicit it cannot be controlled by the rule of construction when statutes are pari materia.

Endlich on Inter. of Stat. Section 53

Van Comp v. Board of Education. 9. O. S. 418

Ash vs. Ash; 9 O. S. 387

Gas Light & Coke Co. vs. Avondale 43 O. S. 267

"If no ambiguity exists in the revision, the court will not refer to or consider the language of the original statutes in determining the meaning of the revised statutes."

Bents vs. Inhabitants; 138 Mass. 99

Poor vs. Considine. 6 Wall. 458

Endlich on Inter. of Stat. Sec 368 and note 69

Thormley vs. U. S. 113 U. S. 310

Section 2486 in plain language, gives the power to the council either to erect gas works or to purchase such works already erected. There is no ambiguity, no uncertainty about the meaning of the language; the authority granted is not subject to any condition, and not coupled with any contingency, and the authority may be exercised either by erecting new gas works, or purchasing works already in existence whenever and wherever a city council may deem it expedient and for the public good. The language as it stands, and the discretionary power conferred is totally inconsistent with the limitation claimed for it by opposing counsel.

In 1869 there had been such progress and such growing demand, that, in the opinion of the legislature, the time had come when municipalities should be invested with the full, clear and distinct power of building gas works, or buying from corporations

whenever the city council should deem it for the public interest to do so.

But it is said by complainant's counsel that the construction which we claim for section 2486 renders sections 2480 and 2482 nugatory and meaningless; that the two latter sections are for the sole purpose of enabling city councils to erect gas works when private companies have made default, and that if the legislature intended to confer by section 2486 full and unconditional power to build, it would, when it revised the laws in 1869, have repealed sections 2480 and 2482 because no longer of any value. And hence opposing counsel contend that inasmuch as the legislature did not repeal these sections, it intended to give to section 2486 no other effect than to enable the cities to build when private companies had made default or when there were no private companies in existence. The whole force of this argument depends upon the assumption that sections 2480 and 2482 serve no other purpose than than that of enabling cities to build upon default of private companies. And the whole force of the argument is avoided when we notice that the main objects of these sections are to enfore upon private companies the performance of their duties.

Section 2480 visits a penalty upon private companies when they make default. This penalty is not the new works to be constructed by the city, but the power to forever PRECLUDE THE PRIVATE COMPANY from the occupancy of all the streets, alleys and public grounds not already lighted. And the power in the city to build the gas works is simply a means of lighting those streets, alleys and public grounds from which the private companies are precluded.

Section 2482 visits upon a private company a complete forfeiture of all its rights when it fails and neglects, as mentioned in the section. The penalty in

that section is not the power in the city to construct new works, but it is the *forfeiture* of the *private company of all its rights*, and the power of the city to build new works is simply to enable it to furnish the lighting which the private company can no longer supply.

Section 2486 does not effect these sections or relieve the private companies from their duties to conform to their provisions. The city may build and operate, under section 2486, without forfeiting the rights of the private company, as provided in section 2482, or without precluding the private company from occupying any and all of the streets, alleys and public grounds of the city, as provided in section 2480.

The private company can not be precluded from the streets, alleys and public grounds under section 2480, or deprived of all its rights under section 2482 simply because the city builds new works under section 2486, but only when they make the default mentioned in sections 2480 and 2482.

Hence to serve all the beneficial purposes, the legislature, at the time of the revision, found it necessary to leave standing as a part of the law, sections 2480 and 2482, and also found it necessary to enact section 2486 in order to confer upon the municipalities the new power, which, in the opinion of the legislature, public policy required.

Again, we may well urge that if there be any conflict or repugnancy between section 2486 and sections 2480 and 2482, that section 2486 is last in point of time and local position, and must prevail in its full vigor, and sections 2480 and 2482 must yield on any and all points wherein they may conflict with the other sections.

The canon of construction is that, when in a statute there are several clauses which are incon-

sistent and irreconcilable. The one last in time or local position must prevail.

Endlish Inter. Stat. Sec. 216.

"The fittest course in all cases where the intention of the Legislature is brought into question is to adhere to the words of the statute, construing them to their natural import in the order in which they stand in the Act."

Dwarris on Stat. 583.

Rex vs. Remsgate 6 B. & C. 712.

We claim the construction we contend for is in harmony with this rule and gives to all these sections their proper meaning.

There is no opportunity in the present case to invoke the rule that a later clause in a statute which is obscure and incoherent will not prevail over an earlier one which is clear and explicit. Because, the provisions of section 2486 are plain, unequivocal, and of definite import.

The Courts of the United States refuse to pronounce a state statute void merely upon the ground that it interferes with vested rights, provided it does not operate to impair the obligation of a contract and is not an expost facto law.

Satterlee vs. Matthewson; 2 Pet. 380.

Balto & Susquehanna R. R. vs. Nesbit 10 How. 395.

We desire also to call attention to the rule that in administering the statutes of any State the Federal courts follow settled decisions made by the courts of last resort of the state in question.

Jefferson Branch Bank vs. Skelley, 1 Black 493.

If this be the rule and the court finds no reason to depart from it, then this is no longer an open question, for the Supreme Court of Ohio, at the January Term, 1890, has construed this legislation precisely as

we claim it, and effectually closed the door of further controversy on this point in a quo warranto case instituted by the Attorney-General of Ohio at the instance of this complainant, to test the right of the City of Hamilton to build the very gas works that are the foundation of the complaint in this case at bar.

State ex rel vs. City of Hamilton; 47 O. S. 52.

This construction of the statute has become a rule of property in this state, and we may well urge that on the faith of it the City af Hamilton, at great expense, has completed the works and furnished her own lighting, while the complainant still occupies the streets and alleys and furnishes gas to its patrons, as heretofore.

III

THE OBLIGATION OF CONTRACT.

The next inquiry thrust upon us by complainant is: "Has the State of Ohio, through the City of Hamilton, done anything to impair the obligation of a contract?"

We maintain the negative for the reason that there was after January 1, 1889 no contractual relation between the complainant and the city or the State.

The complainant claims that the charter granted to it by the State amounts to a contract, and that the State is, by the Constitution, prevented from any legislation changing the conditions of its existence and operations as they were at the time the complainant was incorporated; that as no municipality had any authority to build and operate gas works when the complainant was incorporated, the State cannot now authorize any municipal corporation

to build gas works where a private company is already in operation.

They base this proposition on the line of authorities beginning with Fletcher V. Peck, 6 Cranch 87, 4 and the Dartmouth College Case. 4 Wheat. 518.

We must not be unmindful of the important constitution provisions in the State of Ohio to protect the State against the construction of the Federal Constitution as established by these cases.

The doctrine of the case of Dartmouth College vs. Woodward was of such far reaching effect that many States adopted constitutional provisions forbidding their legislature from granting to any corporation any powers whatever not subject to amendment or alteration.

Justice Story, in his opinion in the Dartmouth College case first gave warning of the danger of conferring irrevocable corporate power unless the State expressly reserved authority over corporations created by it.

"If the legislature means to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation, and I am therefore bound to declare that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are consequently, unconstitutional and void."

4 Wheat. 518.

Judge Cooley in his work on Constitutional Limitations, in the note on page 278, uses the following language:

"It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually

having greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense – being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution whose purpose was to preclude the repudiation of debts and just contracts, protects and prepetuates the evil. To guard against such calamities in the future, it is customary now for the people in framing their constitutions to forbid the granting of corporate powers except subject to amendment and repeal; but the improvident grants of an early day are beyond their reach."

The framers of our Constitution, profiting by the experience of the States which had made improvident corporate grants of power, and with a view of reserving the powers of the people, provided in the present Constitution of Ohio as follows:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit. And they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that cannot be altered, revoked or repealed by the General Assembly."

Sec. 2. Art. 1.

"The General Assembly shall pass no special act conferring corporate powers."

Sec. 1. Art. 13.

"Corporations may be formed under the general laws; but all such laws may, from time to time, be altered or repealed."

Sec. 2. Art. 13.

These constitutional limitations upon the powers of corporations have been construed by the Supreme Court of Ohio and by the Supreme Court of the United States.

Referring to Section 2 of Article I3, and Section 2 of Article 1, the Supreme court of Ohio says:

"We have no hesitation in saying that the right in question comes under these provisions. The two sections, taken together, most clearly reserve the legislative power in question The power to repeal the law and thereby prevent the formation of future corporations under it, existed under the old constitution. If counsel are right in their claim, then these provisions of the present constitution mean nothing or affect nothing."

Shields vs. State of Ohio; 26 O. S. p. 94.

Justice Swayne, in deciding the same case in the Supreme Court of the Uni ted States, uses the following language:

"The company took the franchises subject expressly to the power of alterations or repeals by the General Assembly; there is, therefore, no ground of just complaint against the State."

Shields vs. Ohio; 95 U. S. Reports, 319.

The complainant was bound to know these provisions of the constitution when it was incorporated.

"The company was bound to know the law and the powers of the council, and there is shown no principle or act of estoppel that prevents the village from now setting up such want of power in that former council, or that estopped the village from disregarding, in future, and after due notice, any part or all of that contract."

Gas Co. vs. Avondale, 43 O. S. p. 269.

Railroad Com. vs. Portland etc. Railroad, 63 Me. 269.

Tomilson vs. Jessup, 15 Wall. 454.

Miller vs. State, 15 Wall. 478

Holyoke Co. vs. Lyman, 15 Wall 500.

When the complainant was incorporated it received from the legislature the power to manufacture and sell, and to furnish such quantities of gas as might be required in the city for public and private buildings, or for other purposes.

(70) Section LIII, 1 S. & C. p. 300.

Printed in Complainant's Brief p. 11.

But it received this grant subject to certain conditions:

1st. That the company could enjoy no special privileges or immunities because forbidden by the Constitution of Ohio. (Sec. 2; Art. I.)

2nd. That the grant to it was under a general law, which might under the state constitution be altered or repealed. (Sec. 2; Art XIII.)

3rd. That Section 66 (1 S. & C. 299) of the Act under which it incorporated, provided that all such corporations are subject "to the restrictions hereafter provided."

It must be noted that the restrictions mentioned in the statute are those that should "hereafter" and not "hereinafter" be provided, the reference being to time, and referring to legislation that might in the future be enacted, and not to provisions already contained in the statute. So it cannot be said that the complainant was to enjoy in perpetuity the right to manufacture, sell and furnish the gas required in Hamilton to the exclusion of all others.

Besides the company did not become entitled to sell its gas to the city and its citizens, and the city and its citizens did not become obligated to purchase

of the complainant by virtue of the statute, or by virtue of its incorporation, or by virtue of its authority from the city to build its works, or by virtue of all these elements together. The company became entitled to sell, and the city became obligated to buy when, and *only when a contract should be made between the city and the company, and only during the continuance of such contract.* The power to make such contract was contained in Section (71) LIV of the act under which the complainant was incorporated.

We quote two sections of the act passed May 2, 1852, and in force when complainant was organized:

(70) SECTION LIII. Any corporation formed under this act shall have full powers, if a gas company to manufacture and sell, and to furnish such quantities of gas or water as may be required in the city, town or village where located, for public and private buildings, or for other purposes; and such corporation shall have power to lay conductors for conducting water or gas through the streets, lands, alleys and squares, in such city, town or village, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe.

(71) SECTION LIV. The municipal authorities of any city, town or village in which any gas light or water company shall be organized under this act are hereby authorized to contract with any such corporation, for the lighting and supplying with water, the streets, lands, squares and public places in any such city, town or village.

1 S. & C. pp. 299 and 300.

See complainant's brief, p. 11.

The former enables the company to sell and the latter enables the city to buy gas, but neither is bound

to the other *except by contract.* If the contract is limited in point of time, the one party cannot be compelled to sell, and the other party cannot be compelled to purchase after the contract has expired.

If opposing counsel be correct in their contention that section LIII above referred to authorizing the incorporation of gas companies, the incorporation of the company, and the construction of the works under the consent of council, vested in the company the right to manufacture and sell gas to the city and its citizens, what was the necessity of section LIV? It is clear that the legislative grant to incorporate, the incorporation, the consent of the municipal authorities for the construction of the works, and the erection of the works, *did not constitute any contractual relations between the city and the company* imposing upon the former the obligation to purchase gas from the latter. *No such obligation existed unless called into being by a contract made under section* LIV.

The parties to this suit ever since the incorporation of the gas company acted according to the foregoing construction of the statute.

Written contracts were made between complainant and defendant for lighting the city as follows:

April 10th, 1862, covering the time from February 1862 to September 1865. (Record p. 48, Exhibit A.)

November 13th, 1865 for five years. (Record p. 49 Exhibit B.)

June 3rd, 1868 for ten years. (Record p. 51, Exhibit D.)

June 3rd, 1878 for five years. (Record p. 56 Exhibit J.)

July 16th, 1883 for five years. (Record p. 17, Exhibit E.)

The last contract expired January 1st, 1889, when

the city declined to enter into any other contract with the complainant, and thereupon this complainant brought this suit.

Since it was not the statute authorizing the incorporation of the gas company and granting to it its corporate powers that constituted a contract, *but the agreement that should thereafter be entered into between the company and the city*, it follows that if the contract terminated by the expiration of time, there was then no contract in existence that can possibly call for the constitutional protection of contracts.

"It is not the charter which is protected by the court, but only any contract which the charter may contain; if there is no contract there is nothing in the grant on which the constitution may act."

Stone vs. Miss; 101, U S., 814.

Again, the general statute which gave to the complainant corporate life and corporate functions conferred upon it nothing more than the right, with the consent of the city, to manufacture and sell gas, and this right it still enjoys. Neither the State nor the city has done anything to impair this right whether it has its foundation in contract or not. When the State conferred authority on the city to construct works, it did not, in the least, impair complainant's right to enjoy all the privileges, and exercise all the functions conferred upon it by the general statute, for the general statute never gave it the right to sell gas to the city *except when the city was willing to take it under contract.*

The statute conferring upon the municipality the right to make contracts with the gas company for the purchase of gas from it, necessarily implies power in the city to refuse to make such contracts. And that is all the city has done in this case, and it is the sum total of the complainant's grievance.

Besides, as before stated, if the grant of corporate life and functions to the complainant involve a contract between it and the state, this contract under the constitutional provisions of Ohio, above quoted, was subject to alteration and repeal, and the state might revoke it.

IV

VESTED RIGHTS—DUE PROCESS OF LAW.

The next inquiry is:

Has the complainant such a vested right or property right in furnishing and selling gas to the city or its citizens, that the city's refusal to buy, and erection of its own gas works is an appropriation or taking of complainant's property within the constitutional inhibition?

We maintain the negative.

By its incorporation the complainant acquired certain rights:

First. A corporate name.

Second: The right to manufacture gas in the City of Hamilton for the purpose of supplying public and private consumers.

Third. The right to have a capital stock divided into shares.

Fourth. The right to hold and acquire property for the purposes of its incorporation.

Fifth. The right to sue and to be sued.

Sixth. The right to contract and be contracted with.

There is no controversy about any of these corporate rights except the second. The complainant claims that it had the right to supply the City of Hamilton and its citizens with gas to the exclusion of everybody else, and as long as it desires and is able to meet the demand.

We contend that the right it acquired from the State, while it empowered the company to sell, did not compel anybody to buy.

Under this grant the complainant had the right by consent of the city, to construct its works, use the streets, alleys and public grounds for the distribution of its gas among its patrons. All these rights it now has; there is no complaint that the defendant has done anything that interferes in the least with the complainant's right to manufacture, conduct and sell its gas to any and all persons desiring to purchase. But it is claimed that the city in its refusal to take complainant's gas, and in constructing works for itself, has made the complainant's property much less valuable, and that by this *reduction* of its value *has taken* complainant's property within the meaning of the constitution.

The right to build gas works in the City of Hamilton, lay mains and pipes in the streets and alleys, and conduct and distribute gas to consumers, does not imply that no other company or authority can also build works in said city and use the streets, alleys and public grounds for laying mains and pipes, and conducting and distributing gas. No more than the legislative grant of a toll bridge across a river implies that no other toll bridge by a private company or free bridge by the public can thereafter be built which might diminish the tolls received by the first one, no more than the legislative grant to a railroad company to construct a railroad between two cities implies that no other company or the public authorities shall construct and operate a line of railroad between the same cities which might possibly reduce the fares and freights of the former one.

Charles River Bridge vs. Warren Bride 11 Pet. 419.

Stone vs. Farmers' Loan & Trust Co. 116 U. S. 307.

Cooley's Con. Lim. Sec. 284.

New York vs. Squire, decided by the United States Supreme Court, May 2, 1892.

On this point it is well to consider the rights and powers of the City of Hamilton under the legislation existing at the time the complainant was incorporated.

"All municipal corporations organized, or to be organized, under this act * * * shall have the general powers and privileges * * * prescribed in the twenty succeeding sections of this act."

Sec. 19, S. & C. 1498. Passed May 3, 1852.

"They shall have power * * * to light streets alleys, public grounds, wharves, landing places and market space."

Sec. 26, S. & C. p. 1501. Passed May 3, 1852.

This the city could do in any way which to it might seem proper and best for the people of the city; by oil, or gas, or any other known mode of lighting.

"The municipal authorities of any city * * * in which any gas light * * * company shall be organized under this act, are hereby authorized to contract with any such corporation for the lighting or supplying with gas the streets, alleys, squares and public places in any such city, town or village."

Sec. 71, S. & C. p. 300. Passed April 9, 1852.

Here is authority for the making of an express contract between two competent contracting parties, in which all the elements of a contract may be embraced, such as quantity and quality of the article bargained for, the price to be paid for the same, and the duration of the contract.

This section stood when complainant received its charter. The preceding section gave the company its

corporate function—power to furnish the gas in such quantities as might be required for private and public lighting in Hamilton, and power with the consent of the municipal authorities to lay its pipes. But this established no *contractual relations*, gave the company *no vested or property right in lighting the city or the inhabitants.* The company might incorporate, get its charter, build its works, get the consent of the city and lay its pipes, and still have no contract - no vested or property right in public or private lighting. This contract or property right it acquired by an agreement made with consumers; for public lighting by an agreement with the municipal authorities, under Sec. (71) LIV, above quoted. And limitation of the time during which the company should furnish and the city buy gas, is an element as important in the contract as the price itself.

The city under the section could contract with the company as soon as the latter was organized; it need not wait till the works were erected. It is fair to presume that the company before investing its capital would see to it that the contract was of sufficient duration to bring adequate returns so as to justify the expenditure.

The law was so formed as to give it this opportunity, and no presumption arises that the company expended its money on the faith that the city would, or was compelled, to continue to buy gas after the contract had expired. Indeed the complainant on the very day it was incorporated made a contract with the city, whereby it obtained the exclusive monopoly for twenty years.

Sec. Record p 48. Exhibit D, Sec. 3.

For thirty-three years, since 1855, the City of Hamilton, has seen proper to exercise this power to

contract with the complainant in this case to light its streets and public buildings, said contracts being express, signed by the contracting parties, and limited in time. The last contract expired on the first of January, 1889.

Thereupon the defendant notified the complainant that it did not any longer desire the plaintiff to furnish gas to light its streets; in order that there might be no misunderstanding or implied obligation on the defendant to pay for any gas which the complainant might thereafter furnish.

The defendant then desired to use better methods of lighting, which exist at the present time.

It bought lamps to put upon its posts, adapted to burning gasoline.

It also desired to construct gas works of its own, with all modern improvements, and of capacity to meet the increased wants of the city.

The statute gave to the city the power "to light the streets, alleys, public grounds and buildings."

Sec. 1692, Par. 18, Rev. Stat.

And also gave power to the city to levy a tax "for erecting, enlarging and improving gas works and for lighting the corporation."

Sec. 2683, Par. 18, Rev. Stat.

Also gave power to build gas works under the Section before quoted.

Sec. 2486, Rev. Stat.

It may be contended that the provisions of the section last cited are inoperative so far as it authorizes the city to build new works, for the reason that the section which follows does not enable the city to appoint gas trustees except when the city purchases gas works already built.

This section authorizing the appointment of trustees was first enacted in 1869 and read as follows:

"When such purchase shall have been made, the council shall appoint a board of five trusees, which shall manage the gas works and supply the corporation and the citizens thereof with gas; and the trustees shall serve until their successors are elected and qualified, as hereinafter provided." Sec. 424, 66, O. L. p. 219. It stood in this form until amended, March 18th, 1889. It is true the section only expressly authorizes the appointment of trustees when the city *purchases* and not when the city *builds*. But opposing counsel are in no position to make any argument from this fact. It proves too much for their case. They contend that under certain conditions the city may build under the provisions of Sections 2480 and 2482; and there is no authority for appointing trustees of gas works built under these sections any more than for gas works built under Section 2486. Again, the argument, if it has any force, directs itself against the complainant's construction of 2486 for opposing counsel concede that the city may build ununder this section in municipalities where no gas works are in existence. If the city can build gas works, and appoint trustees to manage them, or operate them without trustees in cities where there are *no* private gas works, under the authority of Section 2486, it has the same power to do the same thing in cities where there *are* private gas works.

It seems to us there is no difficulty because of the language of Section 2487 above quoted: "A municipal corporation possesses and can exercise the following powers:

1. Those granted in express words.

2. Those necessarily or fairly implied, or incident to the powers expressly granted.

3. Those essential to the declared object and

purpose of the corporation; not simply inconvenient, but indispensible."

I Dillon on Mun. Cor. p. 89.

Citizens' Sav. & Loan Asso. vs. Topeka, 20 Wall. 655.

The express power to erect gas works being conferred on the council, the power to appoint proper officers or trustees for their erection and management would seem to be necessarily and fairly implied.

"Council may provide for the appointment or election by the electors of the corporation, wards, or districts, as the case may require, of such officers as it may deem necessary for the good government of the corporation and the full exercise of its corporate powers."

Sec. 1710, Rev. Stat. of Ohio.

We think the above section is sufficient statutory authority to enable the city to create officers or trustees to manage gas works without the provision of section 2487.

The General Assembly of Ohio reccgnizes the full power of municipalities to build as well as to buy gas works, for on March 18, 1889 it amended Section 2487 so as to remove all uncertainty. So the section now reads as follows:

"2487. When such purchase shall have been made, or gas works erected, or authorized to be erected, at the expense of the corporation, the city council shall appoint a board of trustees," etc.

In view of the fact that this section was amended within three months after the contract between the complainant and defendant expired and the former brought this suit against the latter, we may fairly urge that the city erected the gas works after the amendment had been passed and is now operating them under its provision.

It would seem clear that under the statutes of Ohio the city council may do any of four things:

Light its streets with gasoline, or oil, under section 1692, Rev. Stat.

Or it may contract with the present gas company to furnish it gas, under Sec. 3551, Rev. Stat. which is a re-enactment of the old section passed May 3, 1852, above quoted. Sec. (71) LIV. 1 S. & C. 300.

Or it may erect, or buy works under Sec. 2486, Rev. Stat.

Or it may, from time to time, regulate the price of gas, under Sec. 2478, Rev. Stat., and use such amount of gas as it desires, and pay for the same under its implied contract to pay for that which it uses.

Each of these rights we claim to be distinct, and clearly exist under the law.

Whatever right the gas company has, was simply to furnish gas, and that was a right, like any other individual, to compete with all the world.

This whole question is ably discussed in the case of Saginaw Gas Light Co. vs. City of Saginaw, 28 Fed. Rep. 529, wherein it was held:

"The authority to cause the streets to be lighted, and to make reasonable regulations with reference thereto, does not empower the city government to grant to one company the exclusive right to furnish gas for thirty years."

"The exclusive right to light the city with gas for thirty years is not legally impaired by a subsequent contract with another company to light the streets with electricity."

We contend, therefore, that the plaintiff's charter, authorizing it only to manufacture and sell gas, is not in any view of the question the exclusive right to light the streets of Hamilton, when no contract

made under Sec. 3551 (formerly 71 above quoted) is in force.

Counsel for complainant reach their conclusion on this question by assuming that the general statute of Ohio authorizing the incorporation of complainant and giving to it the power to manufacture and sell gas in the city of Hamilton, by implication makes the right to sell exclusive and perpetual in complainant, and the duty to buy of it obligatory upon the city.

The intent of the state to make a permanent grant cannot be inferred from equivocal language.

Charles R. Bridge vs. Warren Bridge. 11 Pet. 420.

Tucker vs. Furguson. 22 Wall. 527.

Railroad vs. Land Com. 21 Pa. S. 22.

All grants by the State are construed in favor of the public, and all reasonable doubt as to meaning of language must be resolved in favor of the State.

Minturn vs. La Rue; 64 U. S. 435.

Newton vs. Commissioners; 100 U. S. 548.

The Northwestern Fer. Co. vs. Village; 97 U. S. 659.

We suppose that it will not be denied that the complainant has always been liable to competition; any five persons may organize a gas company to operate in the same city with complainant, under the general statute of Ohio, and according to the logic of complainant's counsel, the municipality might purchase, under the provisions of Section 2486 Rev. Stat. of Ohio, the works of this new company and operate the same in competition with complainant. Thus the logic of opposing counsel leads to the conclusion that the municipality can do indirectly, what they claim it cannot do directly.

V.

THE RIGHT TO SUPPLY WANT.

The fourth proposition made by complainant's counsel in their brief on page 61 is met by the statute 2486 which empowers the city council to be the judge as to whether the public want has been sufficiently supplied; and if in the opinion of the city council, the want has not been supplied, and the council deem it expedient and for the public good to erect gas works, it may proceed to do so. The conditions confronting the city council present a question of fact, of which the law makes the council the judge, and it is not for the courts to review their findings on this question in the absence of any fraud.

The complainant presents the claim in its brief (pages 63 and 64) that the city by the construction or operation of its own gas works is entering into the business of private manufacturing in competition with private parties, and that the law prohibits this.

Our answer to this is, that the primary object on part of the city in constructing and operating gas works, is to supply a *public* want (see affidavit of John Dirk and George C. Rice, Record p. 65) and in no sense to engage in private business. A municipality has need of water, of gas, fire protection, police protection, etc.; and these are all public wants coming under police regulations, and may be supplied by the public authorities—in some cases by purchase from third parties, in others by manufacturing through its own officers, agents and employes. If gas or water is supplied to the citizens of the municipality for private uses, it is but a mere incident to the public uses for the supply of which the municipality engages in the business.

Fellows vs. Walker; 39 Federal Rep. p. 651.

Gibbs vs. Gas Company. 130 U. S. 396.

Sharpless vs. Philadelphia; 21 Pa. St. 147.

Opinion of the Supreme Court to House of Rep; 150 Mass. 394 or 592.

The Supreme Court of Ohio has held "that the supplying of municipal corporations and their citizens with natural gas is a public use or purpose, for which the taxing powers may be constitutionally exercised."

State ex rel. vs Toledo; 48 O. S. 112.

And as this point involves no question of Federal jurisdiction in this case, the decision of our own Supreme Court will no doubt meet with weighty consideration.

There is no difference in principle between supplying the city and its citizens with artificial gas than supplying them with natural gas.

VI.

CITIES' RIGHTS TO CHOOSE BETTER METHODS.

The seventh proposition made by the other side in their brief (page 70) is that the city having once chosen a method for lighting the streets, cannot change and adopt another method. This dogma would forever put this city and any other city having a private gas company in bondage to the private corporation with which it, at any time, had a contract for public lighting. And would also close the door to public progress so that no city could ever avail itself of modern improvements in the method of lighting. Such a construction would certainly be in favor of monopoly, and against public policy. (See opinion of Justice Brown in the case of Saginaw Gas Co., vs. City; 28 Fed. Rep. 529.)

Craft vs. McConoughy; 76 Ills. 346.

People ex rel. vs. Chicago Gas Co., 22 Northeastern Rep. 798.

Railroad vs. Collins; 40 Ga. 582.

Hazelhurst vs. Railroad Co.; 43 Ga. 13.

Coal Co. vs. Coal Co.; 68 Pa. 173.

Transportation Co. vs. Pipe Line Co.; 22 W. Va. 600.

Salt Co. vs. Guthrie; 35 O. S. 666.

We answer the eleventh proposition of opposing counsel, found on page 76 of their brief, that a tax to subserve private interest is unauthorized and void; that no tax for a private purpose has been levied by the defendant. The tax complained of by the gas company was levied for a public purpose, to construct public works for the purpose of supplying public wants.

The Revised Statutes of Ohio, Section 2683, par. 18, authorizes the city council to levy a tax "for erecting, enlarging and improving gas works, and for lighting the corporation."

That this grant is valid, and the tax levied under it constitutional, has been decided by our own Supreme Court.

State ex. rel. vs. City of Hamilton; 47 O. S. 52.

We agree with complainant's counsel that the questions involved in this case are important to the complainant and to the public; and we add that they are also important to the defendant.

Learned counsel, opposed to us in this action, tell the number of gas works in the United States and the amount of capital invested, and then express their undoubted opinion that the citizens of Ohio would still find it necessary to carry lanterns at night to light their way through the streets of their cities, had the understanding prevailed among capitalists that the municipalities were not prevented from

erecting and operating their own gas works at any time they might see fit to do so. (Brief p. 60.) We will not travel out of the record to state the number of cities, their wealth, their population or their importance. But we venture the statement that no municipality in the State of Ohio, would have ever granted to any gas company its consent for the occupancy of its "streets, lands, alleys and squares," had the understanding prevailed that the municipality thereby entered into perpetual bondage to the private gas company, and thereby became irrevocably obligated to buy all its gas from the company, and thereby forever cut itself off from all opportunities to enjoy improved methods of lighting. No, the law was plain, and there could be no misunderstanding between the State or municipality on the one hand, and the capitalist or private corporation on the other hand. The same statute that authorized the incorporation of the company and gave it power to manufacture, sell and furnish gas, in the next succeeding section gave the municipal authorities power to contract with the gas company as soon as the latter should be organized. The private corporation was thereby warned that not its charter, but the contract with the city became the obligatory tie which the law of Ohio as well as the Federal Constitution protects. It invested no money upon the faith of its *charter*, but upon faith of the *contract*. The city was not estopped from any act not violative of this contract.

And when all the terms of the contract are complied with, even to the full measure of the time of its duration, and it has expired by the limitation fixed by its own date, there is no estoppel, no violation of the Federal constitution for either party to refuse to renew the contract.

The complainant has litigated the defendant

through all the courts of our own State on all the questions involved in the record, including the constitutional tests, for the Constitution of Ohio contains provisions similar to those of the Federal Constitution on which complainant relies. And the complainant has thus procured from the highest tribunal of this State a decree vindicating the defendant in all its acts now called in question. And the complainant now appeals to the Supreme Court of our Nation in an independent action for a re-consideration of the whole controversy. And under the claim that the Federal Constitution has been violated, invites this court to judge and determine questions purely of State jurisprudence, the construction of statutes, the city's power to supply a public want, authority to build and operate gas works, to supply private consumers with gas, to levy a tax, and to adopt new and improved methods of lighting.

It is not, however, for us to set a limit to what complainant may urge upon the consideration of the highest court of our land. For to this conservative and potent branch of government in whose keeping and care are the ultimate rights of private property, and from whose judgment there is no appeal, every citizen, in the way provided by law, may come for justice. We, therefore, respectfully submit that there is no reason shown why the judg ment of the most honorable Circuit Court should not stand as the final adjudication between the parties.

N. L. Morey.

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146 U.S. 258

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Supreme Court of the United States.

THE HAMILTON GAS LIGHT AND COKE COMPANY,
Complainant,

[*No. 13,493.*] *vs.*

THE CITY OF HAMILTON, OHIO,
Defendant.

ADDITIONAL BRIEF FOR DEFENDANT.

M. O. BURNS, City Solicitor,
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Of Counsel for Defendant.

DEMOCRAT PRINT, HAMILTON, O.

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ADDITIONAL BRIEF FOR DEFENDANT.

This is an action by Complainant against the Defendant for an injunction, originally commenced in the United States Circuit Court, Western Division of the Southern District of Ohio, and upon decision therein carried up on appeal, by the Complainant, to this Court; and stands for hearing on the complaint and motion for an injunction, and affidavits; no pleading in the case having been filed by the Defendant.

Both parties to this suit are artificial persons, having their being under the Constitution and laws of the State of Ohio. The Complainant is a private corporation organized under the general laws of the State for the private gain of its shareholders. The Defendant is a municipal Corporation organized also under a general law of the State to promote the public and private welfare of its people; and under the laws of the State they are both regarded as citizens thereof.

Baltimore & Ohio R. R. Co. vs. John Cary, 28 O. S., page 208.

Railway vs. Stringer, 32 O. S., page 468.

Roilroad Co. vs. Wheeler, 1 Black 286.

Railroad Co. vs. Harris, 16 Wall 65.

Both parties being citizens of the same State, the judicial authority of this Court cannot be successfully invoked in this case.

FIRST.

Because under the provisions of Section 2, Article III of the Constitution of the United States, jurisdiction of the United States courts is limited to controversies to which *the United states shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or citizens thereof, and foreign states, citizens or subjects;* and to cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction. Hence it is apparent that jurisdiction of this Court cannot accrue under Section 2, Article III of the Constitution.

SECONDLY.

Because this controversy arises under the Constitution and laws of the State of Ohio, and is capable of being adjudicated in the Courts of that State.

The Complainant was incorporated and organized under a general law, enacted by the Legislature of the State of Ohio, bearing date, May 1st, 1852, for the

purpose of erecting works at Hamilton, Ohio, for the manufacture of gas and coke. Its organization was effected in June, 1855. An ordinance was enacted by the Council of the Defendant granting to the Complainant the franchise to occupy the streets and public places of the City, in which to lay its conductors to distribute gas to such consumers as might choose to purchase its commodity. And Defendant, in August, 1855, made a contract with Complainant to purchase gas of it thereafter for the period of twenty years for the public lighting. That contract was consummated, and other contracts between the parties from time to time were made and carried on until the 1st. day of January, 1889, when the last contract made between the parties expired. Defendant declined to make another contract for the public lighting with Complainant.

And thereupon Defendant erected and put into successful operation Gas Works, for the manufacture and supply of gas, for the lighting of its streets and public places, and for the private use of such of its inhabitants as might choose to purchase gas of its manufacture. And it may be stated parenthetically, as a fact, that for more than two years last past, Defendant, ever since the completion of its Gas Works, has supplied the public lighting of said City, and private consumers, gas of superior quality at less than one-half the prices theretofore demanded, and paid to Complainant during the time it furnished gas to Defendant.

Upon this plain, accurate statement of facts, Defendant claims that this Court cannot entertain jurisdiction of the parties or subject matter. The Courts of the State of Ohio alone are empowered to adjudicate the matters at issue between the parties.

That important function has already been per-

formed by the highest tribunal of the State, in the case of the Complainant herein against the Defendant herein, in an action in quo warranto, entitled State ex rel. vs. City of Hamilton. 47 O. S. R., page 52.

Every feature of the controversy between the parties was elaborately presented in the trial, and carefully considered and clearly decided by the Court in that case, and that Court again passed upon the same question in the case of The State ex rel. vs. City of Toledo, 48 O. S. R. 112, and again decided in favor of the Municipality.

Those two decisions are conclusive of the question of the right of municipalities in the State of Ohio, to erect, own and operate Gas Works to manufacture and supply gas for their public lighting and for the private use of their inhabitants. In view of the often times decided and well settled opinion of this Court, that United States Courts adopt and follow the decisions of the State Courts on questions which concern merely the Constitution and laws of the state, it would seem superfluous to trench upon the valuable time of this Court with any extended discussion of what is the law of the State of Ohio. That is no longer an open problem.

"This Court follows the adjudication of the highest Court of a State in the construction of its own statutes."

McElvaine vs. Brush 142 U. S. 155.

Stutsman County vs. Wallace, 142 U. S. 293.

The decision of the State courts on the question as to what are the laws of a state, is binding upon those of the United States. Whether a statute of a state has or has not a binding force, it is for the courts of the states to determine and such determination involves no infraction of the Constitution of the United

States, and raises no Federal question giving to the courts no jurisdiction.

Duncan vs. McCall, 139 U. S. 449.
Luther vs. Borden, 48 U. S. 7.

IMPAIRMENT OF THE OBLIGATION OF A CONTRACT.

But Complainant avers that by the act of the erection and operation of Gas Works by Defendant to supply the public want and the private wants of its inhabitants it has *impaired* the obligation of a contract subsisting between Defendant and the Complainant and has thereby violated the Constitution of the United States, and on that ground seeks the intervention of this Court to decree the redress to which it claims to be entitled.

To determine whether any contract existed between Complainant and Defendant at the time this action was commenced, and the obligation of which contract was impaired by the act of Defendant in constructing and operating its Gas Works, it is proper and necessary to examine the Constitution and Statutes of the State of Ohio relative to the rights and authority of said parties respectively thereunder.

CONSTITUTION OF OHIO.

The provisions of the Constitution of Ohio, relative to the granting and withdrawing of corporate powers are as follows:

SECTION 1 ARTICLE XIII.

"The General Assembly shall pass no special act conferring corporate powers."

SECTION 2 ARTICLE XIII.

"Corporations may be formed under general laws; but all such laws may be altered or repealed."

SECTION 2 ARTICLE I.

"And no special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the General Assembly."

These constitutional provisions exist now and did exist at the time of the incorporation and organization of the Complainant corporation in the year 1855. Complainant was incorporated and organized under Section XLIX of act of May 1st, 1852, Volume 50, page 289 Ohio laws, now Section 3236 of the Rev. Statutes of Ohio.

Section LIII of the same act provided as follows: "Any corporation formed under this act shall have full power, if a gas company, to manufacture and sell, and to furnish such quantities of gas or water as may be required in the city, town or village where located, for public and private buildings or for other purposes; and such corporations shall have power to lay conductors for conducting water or gas through the streets, lands, alleys, squares, in such city, town or village, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe."

Section LIV of the same act provided as follows: "The municipal authorities of any city, town or village, in which any gas, light or water company shall be organized under this act, are hereby authorized to contract with any such corporation, for the lighting or supplying with water, the streets, lands, lanes, squares, and public places in any such city, town or village."

A reservation is made in said section XLIX in

these words: "*And shall be subject to all the restrictions hereafter provided*," not hereinafter provided, showing that the reservation had reference to *time* and not to *place*.

With knowledge of these Constitutional and Statutory provisions as the law regulating Gas Companies, Complainant erected its works and soon thereafter entered into the business of manufacturing and selling gas to the Defendant and its inhabitants, first under a contract extending for the period of twenty years, and continuing under contracts at different times, thereafter made until January 1st, 1889.

Defendant claims that by its refusal to enter into any other contract with Complainant after January 1st, 1889, all contractual relations between the parties were at an end.

CONTRACT.

But the Complainant on the contrary, claims with serious assurance that its Corporate rights obtained under the general laws of the State and through the act of the City, Defendant, in contracting, at one time, to accept and pay for gas of its manufacture has in some manner ripened into a valid, permanent, irrevocable contract with the State of Ohio, and that by the enactment of laws by the Legislature of the State subsequent to its organization modifying the laws existing at the time of its organization and by the enactment of ordinances by the Defendant, City of Hamilton, providing for the erection and operation of Gas Works, in said City, to supply gas for the public lighting and the private consumption of its inhabitants, that there has been caused an impairment of the obligation of its said contract with the

State of Ohio, and that such impairment is in violation of the Constitution of the United States, and consequently involves a *Federal question* for decision by this Court.

If a Federal question is involved in the case, it is conceded by Defendant, that this Court will have jurisdiction.

CHARTER RIGHTS.

But what are the Charter Rights of an Incorporation? The law has been defined by the Court in the following language: "Nothing passes by a charter except what is given in express terms, or by necessary implication. A Corporation can do only what it is permitted to do by its charter; beyond that it is subject to the law-making power, the same as individuals."

Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

Greenwood vs. Freight Co. 105 U. S. 13.

In grants by the public nothing passes by implication. In doubtful points the construction of the grant must be against the grantee:

Georgia R. & Banking Co. vs. Smith, 128 U. S. 174.

It will never be presumed that a state has relinquished any of its powers by contract.

Charles River Bridge vs. Warren Bridge, 11 Peters, 420.

The grantee takes nothing by inference.

Syracuse Water Co. vs. City of Syracuse, 116 N. Y. 167.

Salt Co. vs. East Saginaw, 13 Wallace 373.

Where the subject matter of a contract concerns the interests of the public, the contract is to be construed liberally in favor of the public.

Joy vs. St. Louis, 138 U. S. 1.

ALTERATION OF LAWS.

The Constitution of Ohio as hereinbefore stated, reserves the right in the Legislature to amend or repeal any law enacted granting corporate privileges, and the Statute of May 1st, 1852, *under* which Complainant was organized, Section XLIX, likewise contained a provision reserving the right to thereafter modify that statute; it is therefore the law of the case that Complainant was fully advised of the provisions of the Constitution and laws of the State at the date of its organization, and it was then, and is now, bound by whatever changes of the Statute have been since made, because all changes must be held to relate back to and become incorporated into the original act as a part thereof.

It was decided by this court in Spring Valley Water Works vs. Antone Schottler, et al. 110 U. S. 347, that "in a state whose constitution puts into every charter the reservation of the right to alter or repeal it, a corporation is subject to the legislative power of alteration, from the moment of its creation, and if deemed expedient of absolute extinguishment as a corporate body." "When amendments to a charter are within the scope of the legislative power, the court cannot interfere with the discretion of the Legislature, that has been vested with authority to make them."

This case arose under the following state of facts, on a suit in mandamus instituted by Antone Schottler et al. to compel the supervisors of San Francisco, California, to appoint a Water Works Commissioner in place of a Commissioner who had died. The Spring Valley Water Works Company was organized in June, 1858, under a law that provided that the water company should furnish water to the city of San Francisco at a reasonable rate to be fixed by two commis-

sioners appointed by the city authorities, two by the company and one by the four thus selected. This was done in the year 1878. In the year 1879 a new Constitution was adopted by the people of California to go into effect January 1st, 1880, and in which it was provided that the rates to be charged for water should be annually fixed by the Board of Supervisors of the city or town.

The Water Company claimed its rights to have its water rates fixed in accordance with the Constitution and laws existing and in force at the time of its organization. The Company had expended large sums of money in erecting water works but all was done in the face of limitations reserved in the Constitution and laws of the State and it was held bound thereby.

See also Munns vs. Ills., 94 U. S. 113.

Also Stein, Exr. vs. Bienville Water Supply Co., 141 U. S. 67.

KNOWLEDGE PRESUMED.

All persons who deal with municipal bodies are conclusively presumed to act upon knowledge of the power of the Legislature to make changes or repeal any Statute in existence; and an individual cannot be said to obtain a vested right in the grant of legislative power to a municipal corporation.

Merriweather vs. Garritt, 102 U. S. 472.

VESTED RIGHTS.

But can it be said that Complainant's right became and is a vested right? In the case of N. O., M. & T. R. R. Co. vs. Ellerman, 105 U. S., 166, a case in which the legislature of the State of Louisiana granted

to the City of New Orleans the right to erect and maintain wharves within its limits, and collect wharfage under its charter, a subsequent grant was made by the Legislature to the railroad company of authority to enclose and occupy for its purposes and uses a specifically described portion of the levee and batture, and exempting it from supervision and control of the city authorities. Held that no right of the city was infringed upon by such subsequent enactment. In announcing the decision Justice Matthews said: "Neither would this be in derogation of any vested right of the city."

Whatever powers the Municipality rightfully enjoys over the subject, are derived from the Legislature.

See also Essex Public Road Board vs. Kinkle, 140 U. S. 334.

Also Chincleclomonche L. & B. Co. vs. Commonwealth, 100 Pa. State R. 438.

Where a corporation enjoys no special privileges under its charter the state violates no contract with it by incorporating another company whose operations are injurious to the first company.

Turnpike vs. State, 3 Wallace, 210.

C. B. & Q. R. R. Co. vs. Iowa, 94 U. S. 155.

Spring Valley Water Works vs. Schottler, 110 U. S. 347.

A previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both and to prescribe the only rules in respect to that subject that are to govern.

Tracy vs. Luffly, 134 U. S. 206.

FEDERAL QUESTION.

To sustain jurisdiction of this Court upon the ground that a Federal question is presented, it should appear, either that such question *was apparent* in the record, or from the facts stated such question must be necessarily involved.

City of New Orleans, et al., vs. N. O. Water Works, et al., 142 U. S. 79.

Church et al. vs. Kelsey et. al., 121 U. S. 282.

The bare averment of a Federal question is not sufficient to give to the U. S. Courts jurisdiction. There must be at least an apparent question in the papers in the case. A public law never confers a vested right unless it contains a stipulation of grant.

Dobbins vs. First National Bank, 112 Ills. 553.

Myer on Vested Rights, page 28, note 93.

CONTRACT—ITS OBLIGATION.

The term contract is used in the Constitution, in its ordinary sense as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual consent to its terms is of its very essence.

Louisiana vs. Mayor of N. O. 109 U. S. 285.

4 Wheaton, 122.

12 Wheaton, 213.

The obligation of a contract is that which compels the person to perform the stipulations. And the term as contained in the Federal Constitution embraces all such contracts as are binding in law and not merely in conscience.

Blair vs. Williams, 4 Littell [Ky.] 34.

Where a party sets up a contract with a state he must establish it clearly. There is no presumption

in his favor. Every reasonable doubt will bere solved against him and in favor of the state.

Newton vs. Commissioners. 100 U. S. 548.

The constitution of the United States—Section 10, Article 1, provides that "No state shall pass any expost facto law, or law impairing the obligation of contracts."

But the Constitution does not prohibit the enactment by the sta'es of retrospective laws, or laws divesting vested rights, provided they do not impair the obligation of contracts.

Blount vs. Windley, 93 U. S. 173

Charles River Bridge vs. Warren Bridge 11 Peters. 420.

Watson vs. Mercer, 11 Peters. 88.

On February 16th, 1846, the Ohio Legislature passed a law that upon fulfillment of certain conditions the County Seat of Mahoning County should be permanently located at Canfield. The conditions were complied with and the County Seat was established accordingly at that place. On April 9th, 1884, the Ohio Legislature passed another Act providing for removal of the County Seat to Youngstown. An action for injunction was instituted to prevent the removal on the ground that the act of the Legislature for the purpose impaired the obligation of a contract. Injunction was refused. The Court deciding that no contract existed by virtue of the Act of 1846; that it was a public law, relating to a public subject and which the Legislature could amend or repeal.

Newton vs. Commissioners, 100 U. S. 548.

Peik vs. C. & N. W. Railway Co. 94 U. S. 164.

Shields vs. Ohio, 95 U. S. 319.

Fox vs. Cincinnati, 104 U. S. 783.

The organization of the Hamilton Gas Light and Coke Company, Complainant, was not a business ar-

rangement, between the State and the Company, as contracting parties, but it was the creation of a new Corporation to do business within the State, and to be governed by the laws as other Corporations or natural persons were or might be governed.

Neither are the chartered rights of the Company under the law to be looked upon as contracts with the City of Hamilton.

The corporation was created by the State. All its powers come from the State, and none from the City. Its powers and obligations depend alone on the Statutes under which it was organized, and such alterations and amendments as may, from time to time, be made by legislative authority.

110 U. S. 284.

DEPRIVATION OF PROPERTY.

Complainant, like any other citizen of Hamilton, must respond to the assessment of taxes. If taxes are collected for a public purpose, a tax payer is not deprived of his property without due process of law because he derives little from certain objects supported by such taxes—less than is enjoyed by other members of the community, when for a public use taxes are not an unauthorized taking of private property.

Kelly vs. Pittsburg, 104 U. S. 78

A law was enacted by the Ohio Legislature authorizing the Board of Public Works to lease the surplus water of the canals of the State for hydraulic purposes. Afterwards a law was passed by the Legislature abandoning a portion of the canal within the City of Cincinnati, for a high way and sewerage purposes. Fox owned a mill propelled by power obtained from the water of the canal.

He claimed that the abandonment of the canal

by legislative act was a deprivation to him of his proper y without due process of law. But the Court held that the State had a right to abandon the canal at any time and that the Lessee was bound to take notice of the Act, and that the Act was valid.

Fox vs. Cincinnati, 104 U. S. 783.
Mugler vs. Kansas, 123 U. S. 623.
Foster vs. Kansas, 112 U. S. 201.
Gas. Co., vs. Avondale, 43 O. S. 269.

Now then it is apparent that no Federal question can arise in this case, unless the same shall accrue from *an impairment of the obligation of a contract* existing between Complainant and Defendant, as provided in Section 10, Article 1, of the Constitution of the United States.

This provision in the Constitution of the United States is a limitation reserved in favor of the whole people against the authority and action of the Constitutional and Legislative powers of the several states, and is protective of the rights of the people.

Since the decision of the Dartmouth College case, 4 Wheaton, 518, nearly, if not quite, all of the Constitutions that have been adopted in the states of this Union, have embodied in them, clauses providing for the organization of incorporations under general laws, and providing also for future legislative authority to amend, modify or repeal any law enacted under such constitution.

THIS CASE.

The Complainant is conclusively presumed to know the provisions of the Constitution of the United States and of the State of Ohio, and as well the provisions of the Statutes existing at the time of its organization, and moreover that the Legislature of Ohio

had authority to make any change in the Statutes of the State within the authority of the Constitution and not in derogation of the Constitution of the United State. And furthermore that any Statutes thus subsequently enacted should relate back and become incorporated into and form part of the original Act, from and after the time of such amendment and modification. Hence although in 1855, at the time Complainant was incorporated and organized there was no Statute of the State specifically providing that the Defendant City, might in its municipal capacity, at the public expense, obtain money by taxation, and erect and operate Gas Works for its public lighting, and to furnish gas to its inhabitants for their private use, yet it was bound to a knowledge that the Legislature of Ohio, had under the authority of the Constitution the power to so modify the laws then existing as to extend that authority to Defendant. It was then bound to know that the State possessed such power. And it was bound to know that it could not obtain from the City of Hamilton through the erection of Gas Works any special privilege or right that could not likewise be granted to another competing company, or that could not be enjoyed and used by the Defendant itself, if its Council deemed it good policy to enter into the manufacture of gas.

Upon the wisdom or the expediency of the act of the City in the erection of Gas Works, this Court will not decide. Such consideration raises no Federal question, and is alone for State adjudication.

Now the Ohio Legislature on May 6th, 1869, revised and re-enacted all of the existing Statutes of the State on the subject of municipal organization, and municipal authority and power; and then for the first time placed in the Statutes of the State Section 2486,

which provides that, "*the Council of any City or Village shall have power, whenever it may be deemed expedient and for the public good, to erect Gas Works at the expense of the corporation, or to purchase any Gas Works already erected therein.*" And this Section 2486 is just as efficacious and binding on Complainant as if the same had been in existence at the time of its organization. It surely cannot be claimed that the provision of said Section 2486, is in itself and standing alone in derogation of the Constitution of the United States. If then it is not in conflict with the Constitution when standing alone, it cannot be rationally claimed that it becomes in conflict with the Constitution through association and combination with the other sections of said municipal law of May 1869, because the Constitution of the State, Section 1, Article 13, specifically provides for just such changes and new laws as are included in said act of 1869.

But Complainant appears to experience some hope of benefit from an inconsistency claimed by it amongst Sections 2479, 2480 and 2486. It is sufficient to say that this Court will not enter into a consideration of the mere inconsistency of the provisions of the several Statutes unless there shall be involved therein a Federal question. That is a matter competent to be settled by adjudication of the State Courts.

The Federal Courts will only give consideration to State Constitutions and to acts of State Legislatures when the same come into conflict with the Constitution of the United States.

It seems to me that this entire case may be resolved into just this:

The State of Ohio, through its general law of 1852 permits and authorizes the Complainant to organize as a Gas Company to be located at Hamilton, Ohio, to manufacture gas. That is all that the State does.